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MILITARY-LEGAL CONSIDERATIONS IN THE EXTENSION OF THE TERRITORIAL SEA

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MILITARY-LEGAL CONSIDERATIONS IN THE EXTENSION OF THE TERRITORIAL SEA

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinion and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

Lieutenant Commander Keith D. Lawrence, U. S. Navy

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SCOPE

A study of the military legal significance of the extension in the breadth of the territorial seas of the world, including an analysis of the pertinent Conventions and international practices. The major topics covered are the effects of such extensions on (1) passage through, under, and over straits and territorial seas (2) the right of innocent passage of warships, and (3) the general hinderances to the operational mobility of a fleet.

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MILITARY-LEGAL CONSIDERATIONS IN THE EXTENSION OF TERRITORIAL SEAS

Chapter I. Introduction

A. General Introduction

In 1960, when the nuclear-powered submarine Triton made its submerged circumnavigation of the globe, it passed, submerged, through the Surigao Strait north of Mindanao in the Philippines, across the Mindanao Sea, through the Celebes Sea to the Makassar Strait between the islands of Borneo and Celebes, and on south of Java into the Indian Ocean. Had the unilateral claims of the Philippines[1] and Indonesia[2] to the waters within their respective archipelagos as internal waters, the Philippine

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1. The Philippine Ministry of Foreign Affairs notified the United Nations Secretariat on Dec. 12, 1955, that "all waters around, between and connecting the different islands belonging to the Philippine Archipelago irrespective of their widths or dimensions, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines." Laws and Regulations on the Regime of the Territorial Sea, U.N. Doc. No. ST/LEG/SER.B/6, at 39 (1956).

2. On Feb. 18, 1960, Indonesia published its Regulation in Lieu of Act No. 4. Clause 2 of Art. 1 claims as inland seas all those areas of the sea within straight baselines "connecting the outermost points on the low water mark of the outermost islands or part of such islands comprising Indonesian territory." Addendum to Supp. to Laws and Regulations on the Regime of the Territorial Sea, U.N. Doc. No. A/CONF.19/5Add.1, at 3-4 (1960).

claim of territorial waters even beyond twelve miles,[3] and Indonesia's claim to a territorial sea of twelve miles been recognized by the United States[4] or established in international law, such navigation would have been impossible without a bilateral agreement. In making such a journey, Triton silently maneuvered through areas claimed by the Philippines and Indonesia as their respective territorial seas and internal waters. Under the general rule of international law, vessels may not pass through internal waters as a matter of right, even if their passage is innocent.[5] Even where innocent passage is allowed,

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3. In a note verbal dated Jan. 20, 1956, from the permanent mission of the Philippines to the United Nations, 2 Yb. Int'l L. Comm., 69-70, U.N. Doc. No. A/CN.4/99 (1956), the Philippine representative claimed as territorial sea all of the area designated by the Treaty of Paris of Dec. 10, 1898. This area forms a box of high sea around the islands, the boundary of which extends almost to Taiwan on the north and is as far as 300 miles from Philippine land in some sections.

4. The United States recognizes neither the Indonesian nor the Philippine claims to a territorial sea greater than three miles from the low water line. Dean, The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas, 54 Am. J. Int'l L. 751, at 765 (1960).

5. 1 Oppenheim, International Law 461 (8th ed. Lauterpacht 1955) [hereinafter cited as Oppenheim].

[illegible]

either in the territorial seas by international law or in inland waters in accordance with international law[6] or the retractable benevolence of the coastal state,[7] submarines are required to travel on the surface of the water and to show their flag.[8]

This is an example of only one of the numerous adverse effects that an internationally recognized extension of territorial seas would impose. Arthur Dean, the chairman of the United States delegations at both the 1958 and the 1960 Geneva conferences on the law of the sea, has stated that,

> The desire of the United States to maintain a relatively narrow territorial sea and, more particularly to prevent any extension to 12 miles was based not merely on the fact that the 3-mile limit has long been recognized in international law but also on compelling military and commercial considerations.[9]

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6. Convention on the Territorial Sea and the Contiguous Zone, April 12, 1961, art. 5, U.N. Doc. No. A/CONF. 13/L.52 (1958). As of Jan. 1964, ratification by one more state was required before the convention would enter into force.

7. For an example see Indonesian Regulation in Lieu of Act No. 4., art. 3, supra note 2.

8. Draft Convention, art. 12, Hague Codification Conference, 1930, League of Nations Pub. No. C. 1930 v. 9; Convention on the Territorial Sea and the Contiguous Zone, art. 14 (6), supra note 6.

9. Dean, Freedom of the Seas, 37 Foreign Affairs 83, at 89 (1958).

either to the territorial army or international law or to
United nations to subscribe duly circumstantial law,[6] by
the extraordinarie investigation on the command crime,[7] pos-
sessions are required to travel on the meaning of the
waters not be given their flow.[8]

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time.

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6. Convention on the Territorial Sea and Zone Contiguous
Seas, April 29, 1958, Geneva, U.S., 15 Pet. No. 47001,
15 U.S.T. 1606 (1964). In an case, legal negligence by
six years which the territorial sea should never have been.

7. Cf. the ex-ships the Convention territorial in laws of
art 70., 4., sec. 7, second term 7.

8. Inter Convention, art. 15, Inter Contiguous Contigu-
ous, 1958, Limited of Nations Law, No. 5, 1192 T. 2,
Convention on the territorial Sea that the Contiguous
Zone, Art. 14 (5), second note 8.

9. Cong. Treaties of Int. Comm. 17 Treaty Update 63, at
44 (1977).

The United States, of course, is by no means the only beneficiary of a narrow territorial sea. As two authorities have phrased it, the retention of narrow territorial sea limits is in the public interest of the "whole of mankind." It results in a "great net advantage in community values."[10]

It will be the purpose of this study to investigate some of the military considerations involved in an extension of the territorial seas of the world from a legal viewpoint and, in so doing, to stress the necessity for considering the military implications thereof whenever policy regarding international agreements in this area is formulated.

The freedom now enjoyed by citizens of the United States and other nations of the Free world can most easily be lost by indifference to the military necessities of the nation. Specifically, what good, in the protection of the Free world, is a strong Navy if, out of political expediency, its hands should be tied by agreements limiting its area of operation to such an extent that it can no longer act effectively?

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10. McDougal & Burke, The Public Order of the Oceans 51-56 (1962) [Hereinafter cited as McDougal].

This question is not asked to belittle the beleaguered politicians. It is raised simply to express the belief that it is not only proper but imperative that international policy makers, both military and civilian, consider the adverse effects which the extension of territorial seas would have on the capability of their nation's armed forces to perform successfully their mission of preserving freedom as a way of life. Mr. Dean supplied emphasis for this point when, shortly after the 1958 Geneva Conference, he wrote that:

> For navigational purposes . . . [the extension of the territorial sea] would change a large Pacific area into a series of unconnected "lakes" of high seas. Surface warships and transports might operate in the straits connecting the international bodies of water, but this right would not, in the absence of a treaty, extend to an aircraft's right to fly over them or to a submarine's right to operate under the surface of them.[11]

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11. Dean, supra note 9, at 90. Mr. Dean, of course, did not limit the effects of an extension of the territorial seas to the Pacific area.

B. Indonesian Examples

In the following discussion of these problems, a large number of examples will be taken from the conditions as they exist in Indonesia. This has been done intentionally to stress the magnitude of the combined effects in any one part of the world.

For the past several years, Indonesian policies and pronouncements have been of prime concern to United States diplomats working on southeast Asian problems. Since December 13, 1957, Indonesia has unilaterally claimed not only a twelve-mile breadth for its territorial sea, but that this distance is measured seaward not from its coasts but from straight base lines connecting specified protruding points of the various islands in its archipelago.[12] When one considers that Indonesia is the worlds largest archipelago,[13] consisting of[14] approximately

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12. Council of Ministers of the Republic of Indonesia proclamation of Dec. 13, 1957. For a translation of the Indonesian text as published in the Indonesian law journal "Hukum", vol. 1958, No. 5-6, Annex I, see Syatauw, Some Newly Established Asian States and the Development of International Law 173-74 (1961).

13. N. Y. World Telegram & Sun World Almanac for 1964, 355.

14. 15 Encyclopedia Americana 70 (1962 ed).

B. Indemnities Committee

In the Twelfth Parliament of Upper Canada, a large number of petitions all to claim some for swallows as they built in chimneys. This was then commonly attributed to one part of the world.

For the most several years, [illegible] petitioned and [illegible] [illegible] to [illegible] [illegible] [illegible]

13,000 islands[15] spread across the waters for more than 1,100 miles from north to south and over 2,800 miles east to west, encompassing roughly 2,500,000 square miles of which only about 575,000 are land, the geographical magnitude of its claim to territorial and inland waters becomes apparent. Its political-military magnitude is equally apparent from its position, both geographic and political, in southeast Asia. It is here that many historic and important sea and air lanes run through and over the oceans and straits which Indonesia now claims to be internal and territorial. Inasmuch as an extension of the territorial seas to twelve miles would make all of the passages through the Indonesian islands internal or territorial waters, recognition of[16] and obedience to Indonesia's claim would effectively close the major gateways to the Indian Ocean.

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15. 3 Off. Rec. U.N. Conf. on the Law of the Sea 43, U.N. Doc. No. A/CONF.13/39 (1958).

16. An unilateral extension does not in itself bind other nations. In the Anglo-Norwegian Fisheries Case, [1951] I.C.J. Rep. 132, the court summarized the rule by saying: "The delimitation of sea areas has always an international aspect, it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law." The United States, the United Kingdom, and at least 14 other governments still regard the Indonesian waters as high seas, Great Britain Central Office of Information, The Territorial Sea 5 (1960).

C. Exclusion of Fisheries Problems

Indonesia, however, has not furnished an example of one of the problems that has beset conferences on the extension of territorial seas: the problem of fishing rights. That this has been a problem in discussions in this area indicates a confusion with regard to the concept of territorial waters. This confusion may best be classified as a failure to distinguish between a coastal state's national boundary designation on the seaward edge of the territorial sea and the various partial jurisdictional rights which it may exercise in limited areas of the high seas.

In conformity to the doctrine of freedom of the seas, there has been no right to exclusive fishing areas in the high seas.[17] Thus, in order to claim exclusive fishing rights it has been necessary to claim co-extensive territorial seas. In 1956, however, at a meeting of the Sixth Committee of the United Nations, a new concept was introduced when Canada proposed the creation of a contiguous zone for exclusive fishing beyond the three mile

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17. Yalem, The International Legal Status of the Territorial Sea, 5 Vill. L. Rev. 206, at 210 (1960) where it is stated that "although customary international law has long recognized that coastal states may exercise sovereignty beyond their territorial sea for the purpose of enforcing sanitary, customs, immigration and fiscal regulations, the question of exclusive fishing rights within the contiguous zone has never been sanctioned by international law."

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19. Ibid., The International Legal Effects of the [illegible] 2 [illegible] (1969) [illegible] 18 [illegible] [illegible] [illegible]

territorial sea and which would extend to a limit of twelve miles.[18] Canada again proposed this concept at the 1958 Geneva Conference.[19] At the 1960 Conference the United States joined Canada in proposing a six-mile territorial sea and an additional six-mile exclusive fishing zone.[20] This "six-plus-six" proposal has been adopted by Senegal, South Africa, Tunisia, Turkey, and Uruguay[21] and may well be on its way to adoption by custom.

The right to exclusive fishing is one of those various partial jurisdictional rights which could well be exercised by a coastal state in specified areas of the high seas by international agreement or custom but which should be distinguished from the setting of a nation's boundary in the sea. The claiming of exclusive fishing rights does not

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18. U.N. Gen. Ass. Off. Rec., 11th Sess., 6th Comm., 493d meeting, para. 57.

19. Submitted as U.N. Doc. No. A/CONF.13/C.1/L.77/Rev.1, on March 29, 1958; see statement of Prime Minister Pearson before the Canadian House of Commons, 108 H.C.Deb. 621 (1963), reprinted in 2 Int'l Leg. Materials 664 (1963).

20. Submitted to 14th Plenary Meeting April 25, 1958, as U.N. Doc. No. A/CONF.13/L.29.

21. See letter from U.S. Assistant Secretary of State Dutton to U.S. Senator Gruening reprinted in 109 Cong. Rec. 11279-80 (1963).

carry with it a claim to that complete sovereign jurisdiction which a nation may exercise within its own boundaries whether they be on land or sea. This being the case, it is not only feasible, but practical and logical as well, to divorce the fisheries question from the territorial seas question.[22]

In other areas of extra-territorial rights this distinction has already been drawn. The breadth of the territorial sea does not affect the coastal state's right to protect itself by reasonable means nor the assertion of its sovereign rights to the natural resources of the continental shelf, nor the enforcement of its customs, fiscal, immigration and sanitation laws and regulations in a contiguous zone. These interest are a source of

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22. By thus eliminating an unnecessary and contentious problem, perhaps there would be a better capability of arriving at an agreement on the breadth of those seas within which a coastal nation may exercise its complete sovereignty. In essence, of course, the U.S.-Canada proposal at the 1960 Geneva Convention drew the distinction between fishing rights and territorial jurisdiction in its 6-mile territorial sea, plus 6-mile exclusive fishing zone proposal. Might not the proposal have had a better chance of passage had it been divided into two distinct proposals so that the legal-political-economic influences and considerations attendent upon its one separate part would not affect the passage of the other part?

[illegible]

legitimate concern to every coastal state, but they can be adequately protected by the imposition of reasonable controls on the use of the high seas without the necessity of a broad territorial sea.[23]

D. Military Advantages of a Broad Territorial Sea

The United States would not have to defend the three-mile limit unless other nations felt that there were compelling reasons for its replacement. The protection of fishing interests is one of the most frequently expressed reasons.[24] While other economic, social, and political reasons have also been given, it is submitted that an equally compelling reason is the substantial military benefit to be gained. This has seldom been advanced as a reason for extension for the motive behind such extensions is not always honorable. It results in a benefit to a nation that is trying to disrupt international commerce and is willing to risk violating the law in order to

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23. For another treatment of this thesis see McDougal 516-20.

24. "The interest in fisheries . . . overshadows all other particular interests that might be advanced to justify the extension." McDougal 71. This is an "extravagance" since authority in a territorial sea is much more comprehensive than is necessary for control of fishing. Id. 71-74.

promote its goal of domination. As the legal effects of a broad territorial sea are discussed more fully below, the importance of this benefit and the threat to freedom which it imposes should become obvious. It is the vision of this threat that prompts this study of what has been called "one of the most controversial questions in contemporary international law."[25]

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25. Sorensen, Law of the Sea, Int'l Conc. No. 520, at 242 (1958). Prof. Sorensen was the Danish representative at the 1958 Geneva Conference.

Chapter II

STATUS OF THE THREE-MILE LIMIT

In order to appreciate the importance of a narrow territorial sea to the defense of the Free world, it is necessary to understand the status of the three-mile limit and some of the forces at work, both behind the scenes and out on the international stage, to broaden it.[26]

A. Extensions of Breadth

As long ago as 1793, the United States adopted a three-mile limit to its territorial sea[27] and in 1794 Congress decreed that "cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States or within a marine league [three nautical miles or 3.453 statute miles] of the coasts or shores thereof" would be subject to the jurisdiction of the United States District Court.[28] Since

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26. See Heinzen, The Three-Mile Limit: Preserving the Freedom of the Seas, 11 Stan. L. Rev. 597 (1959) for a concise, comprehensive history of the origin of the concept of a territorial sea and its width.

27. See Brittin & Watson, International Law for Seagoing Officers 54 (2d ed. 1960).

28. 1 Stat. 381, Sec. 6, at 384.

1793 it has been the traditional position of the United States that the three-mile limit is not only domestic law but also the maximum breadth cognizable under international law and the greatest breadth which conforms to the long-established doctrine of the freedom of the seas. In 1922 the Supreme Court of the United States expressed judicial cognizance of the United States position when, in Cunard v. Mellon,[29] it noted that:

> It is now settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes . . . a marginal belt of the sea extending from the coastline outward a marine league, or three geographical miles.

The use of the words "recognized elsewhere" by the Court must be interpreted as meaning "recognized by some other countries" rather than "recognized by all maritime states" for the honeymoon of the three-mile limit was even then beginning to wane.

By 1930, disagreements over the breadth of territorial seas had become prominent enough to be considered by the Hague Codification Conference. Most of the participating nations favored either a three-mile or a six-mile breadth.

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29. 262 U.S. 100, at 122 (1923).

Only the Soviet Union claimed a twelve-mile breadth.[30] Although it appeared that a greater number were willing to accept a three-mile limit, the matter of the recognition of a contiguous zone for purposes such as customs, fiscal, immigration, and sanitary controls, was tied into the discussion and voting. Since there were not a sufficient number of states in favor of both a three-mile limit and a contiguous zone, the Conference was concluded without reaching agreement on the breadth of the territorial sea.

With the birth of the United Nations, a new attempt was to be made to come to an international decision as to the legal breadth of a territorial sea. The International Law Commission of the United Nations studied all facets of the law of the sea and completed its final draft report[31] to the General Assembly in 1956. As to the breadth of the territorial sea, the Commission was less than specific. It approached the question in this manner:

> 1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.

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30. McDougal 536.

31. For the text of the draft articles see U.N. Doc. No. A/CONF.13/32 (1958).

2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.

3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less.[32]

With the Commissions report as a guide, the United Nations Conference on the Law of the Sea[33] met in Geneva, Switzerland, from February 24 to April 28, 1958.

One product of the Conference was a Convention on the Territorial Sea and the Contiguous Zone.[34] Its twenty-three substantive articles summarize most of the law of the territorial sea. Conspicuously absent is any affirmation of the breadth of the territorial sea.

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32. Id. art. 3.

33. Hereafter referred to as the 1958 Geneva Conference.

34. In accordance with the rules of the Conference, ratification of the Conventions must be given by 22 states before the Convention will enter into force. As of January 1964, 21 states had ratified the Convention on the Territorial Sea and the Contiguous Zone. While it is generally anticipated that at least one more state will ratify this Convention, putting it into force, the absence of such ratification does not affect the importance of the Convention as a current restatement of international law as viewed by a substantial majority of the delegations present.

Despite the enormous number of matters upon which agreement was reached, the delegates could not arrive at a breadth agreeable to at least two-thirds of the delegates, as required by Conference procedural rules.[35]

The Convention describes the limits of the territorial sea by saying only that "The outer limit of territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea."[36] A review of the Conference record, however, leaves little doubt but that the vast majority of the delegations present disapprove of a territorial sea of a greater breadth than twelve miles, but this was not retained in the Convention itself.

The United States delegation entered the Conference with the strong belief that the three-mile limit was firmly established in international law. To support this conclusion, the United States delegation could rely not only on the historical claims of most coastal nations, but also on the fact that more states, and among them most of the

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35. Required by rule 35(1) for matters of substance. U.N. Doc. No. A/CONF.13/35 (1958).

36. The Convention on the Territorial Sea and the Contiguous Zone, art. 6, supra note 6.

35. Compare 15 Pa. C.S. §7311(a) (no recovery if negligence
[illegible] Cas. 80, 1/2001, 1/29 (1992).

36. The Commonwealth as [illegible] Inc. [illegible]
[illegible] Cmwlth. 615, 617 [illegible] 6.

major maritime powers, adhered to the three-mile limit than to any other single limit.[37] While this is an impressive statement, it must also be remembered, particularly when assessing the results of the Conference, that, of the seventy-three coastal states in attendance, hardly more than twenty adhered to the three-mile rule at the time the Conference convened.[38]

Among the dissenters were Chile,[39] Ecuador, and Peru[40] which claimed 200 miles in order to protect their fisheries. Canada and Iceland desired twelve-miles for the same reason.

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37. Sorensen, supra note 25, at 244.

38. Id. at 243. For a summary of the 1956 positions of 38 maritime nations see MacChesney, Situation, Documents and Commentary on Recent Developments in the International Law of the Sea, 51 Naval War College Blue Book Series, 439-501 (1957).

39. The Chilian vote against the United States compromise proposal of six miles is alleged to have been made not out of oposition to the proposal but in retaliation for the recommendation of the U.S. Secretary of the Interior that the United States restore tariffs on copper. See Dean, The Geneva Conference on the Law of the Sea: What Was Accomplished, 52 Am. J. Int'l L. 607, at 616 (1958). However, Chile, by Presidential Declaration, had claimed a 200-mile breadth since June 25, 1947. Great Britain Central Office of Information, The Territorial Sea 4-5 (1960).

40. By Presidential Decree of Nov. 2, 1949. Ibid.

India, Burma, Thailand, Cambodia, Korea and South Viet Nam wanted an extension of the three-mile limit in order to restrict Japanese fishing. The Philippines and Indonesia asserted special rights in large areas of the high seas which would close important navigation and aerial routes to and between India, Australia and New Zealand. And the Union of Soviet Socialist Republics, together with its satellite bloc and several Arab states, wanted a twelve-mile limit, predominantly for political-military purposes.[41] In addition, El Salvador, as a part of its Constitution, issued September 7, 1950, claimed 200 miles and Argentina, by a decree dated October 11, 1946, claimed all of its "epicontinental sea and continental shelf."[42]

With all of these divergent views and special interests, it became apparent that a two-thrids majority of states at the Conference would not support a three-mile

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41. See Dean, Freedom of the Seas, 37 Foreign Affairs 83 (1958).

42. Great Britain Central Office of Information, The Territorial Sea 4-5(1960). Other states having recently extended their claims to 12 miles were Panama in Dec. 1958, China (People's Republic) and United Arab Republic in Sept. 1958, Iraq and Saudi Arabia in Nov. 1958, Libya in March 1959, Iran in April 1959, and Ethiopia since 1953. Ibid. With regard to the Panama claim, it should be noted that the effect is to require all ships passing through the Canal Zone to first pass through Panamanian territorial waters. This results from the fact that territorial sea of the Canal Zone only extends out 3 miles. Ibid. Thus, recognition of Panama's claim would mean that she could regulate all commerce passing through the canal.

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81. See Chen, [illegible] of the Law. 7 Pacific Affairs 17 (1933).

82. Since Article Thirty [illegible] of Interpretation, the Lawyers' Journal [illegible] 3-11-1931. Other [illegible] Inc. Realty Advisory Board to [illegible] Pacific Coast Co., 1928; Colin Campbell's Appellate and Civil Procedure in Iowa. 1929; Iowa Bar Assn. Journal [illegible] in Iowa, 1928; Colin Campbell, Iowa Bar Assn. Journal [illegible] 1931

limit. In an effort to reach agreement, the United States delegation proposed the "six-plus-six" compromise previously mentioned.[43] Of all the proposals at the Conference relative to the breadth of the territorial sea, this proposal received the most votes. It failed of passage by only seven votes.[44]

A second Conference was convened in Geneva in March 1960 with an agenda limited to two questions: the breadth of the territorial sea and the fishery limits. It was generally recognized at this Conference that a proposal to retain the three-mile limit had no chance of passage. Therefore, the United States and Canada joined to submit a proposal, similar to the "six-plus-six" compromise proposal introduced by the United States at the 1958 Geneva Conference. Because of the requirement that two-thirds of those voting must be in favor, the proposal was defeated by one vote. No other proposal regarding the breadth of the territorial sea or fishing limits having survived, the Conference was concluded without adopting any proposal on the two questions before it.

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43. See p. 9 supra.

44. See 2 Off. Rec. 39, U.N. Doc. No.A/CONF.13/38 (1958).

With the failure of a second conference to reach two-thirds agreement on the subject, one may ask with some concern what the present law is. Writing in 1960, Professor Carl Franklin contended that:

> While it is true that in recent years the world has witnessed an increasing number of claims by coastal states to a wider territorial sea, the long history of state practice by the principal maritime states supports the conclusion that the three-mile limit still more nearly represents customary international law than any other figure. Certainly this minimum breadth of territorial sea represents the most rational preference viewed from the perspective of the world community for achieving the maximum utilization of the high seas.[45] (Citations omitted)

At the conclusion of the 1958 Geneva Conference, Mr. Dean presented a somewhat more unequivocal stand.

> It is. . .unwarranted to assume that the traditional three-mile limit of the territorial sea is no longer international law. All efforts to agree on a new figure failed. The fact that a two-thirds vote could not be obtained in favor of the three-mile limit shows merely a desire on the part of many nations to extend their territorial sea, not that such an extension in international law has been accomplished.[46]

It will come as no surprise to learn that Professor Grigory Tunkin, the chairman of the Soviet delegation, disagreed. Professor Tunkin was adamant in stating that "It was conclusively shown in speeches to the Conference

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45. Franklin, The Law of the Sea: Some Recent Developments, 53 Naval War College Blue Book Series 89 (1961).

46. Dean, The Geneva Conference on the Law of the Sea: What Was Accomplished, 52 Am. J. Int'l 607, at 616 (1958).

that the 3-mile limit is not and never has been a generally recognized rule in the law of the sea. The Conference once and for all buried the 3-mile limit legend."[47] Not in the least conceeding the correctness of Professor Tunkin's conclusion, Mr. Dean summarized United States policy at the end of the 1958 Geneva Conference and reiterated the same policy at the close of the 1960 Conference. He wrote:

> We have made it clear from the beginning that in our view the 3-mile rule is and will continue to be established international law, to which we adhere. It is the only breadth of the territorial sea on which there has ever been anything like common agreement. Unilateral acts of states claiming greater territorial seas are not only not sanctioned by any principle of international law but, are indeed in conflict with the universally accepted principle of freedom of the seas. . . .
>
> We have made it clear that in our view there is no obligation on the part of States adhering to the 3-mile rule to recognize claims on the part of other States to a greater breadth of territorial sea. On that we stand.[48]

Since the termination of the 1960 Geneva Conference there have been a number of states which have unilaterally

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47. Tunkin, The Geneva Conference on the Law of the Sea, Int'l Affairs 47 (Moscow, 1958); 3 Off. Rec 168-69; U.N. Doc. No. A/CONF.13/38, at 37 (1958).

48. Dean, Freedom of the Seas, 37 Foreign Affairs 83, at 91 (1958).

extended their territorial seas.[49] Indonesia has reiterated its claim to twelve miles. Albania, Malagasy Republic, and Sudan have joined the twelve-mile group. Cameroon now claims six miles and Senegal, South Africa, Tunisia, Turkey, and Uruguay have adopted the "six plus six" formula proposed by the United States and Canada at the 1960 Geneva Conference. Morocco and Norway claim a twelve-mile fishing zone. Denmark has extended the fisheries limits around Greenland from three to twelve miles and Canada has announced its intention to do the same in mid-May of 1964 in order "to protect Canada's fishing industry."[50]

All in all, over forty states now claim territorial seas of various widths greater than three miles[51] and while, despite these defections, there are still more states recognizing the three-mile limit than any other

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49. See letter of U.S. Assistant Secretary of State Dutton to U.S. Senator Gruening, reprinted in 109 Cong. Rec. 11279-80 (1963).

50. From statement by Prime Minister Pearson, note 18 supra.

51. Ibid.

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single breadth, one wonders whether the three-mile rule is not a lost cause. Are not the cautious words of Professor Franklin that "the three-mile limit still more nearly represents customary international law than any other figure,"[52] more realistic than the flat statement of Mr. Dean that the three-mile rule "will continue to be established international law."[53]

In view of the United States conclusion at the 1960 Geneva Conference that it would be useless to propose a three-mile limit and the number of States that have increased their territorial seas since that time, it would seem that the era of the three-mile limit is fast drawing to a close. To borrow a simile from Dr. Jorge Bocobo of the Philippine delegation at the 1958 Geneva Conference, have we not witnessed the death of Mr. Threemiles and now are watching his heirs, Mr. Sixmiles and Mr. Twelvemiles argue over the settlement of the estate.

To carry the analogy further, however, until the estate is settled -- until the heirs know how they will fare under the Will -- Mr. Threemiles still weilds some influence. While the exact limit to be recognized in

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52. Franklin, op. cit. supra note 45.

53. Dean, Freedom of the Seas, 37 Foreign Affairs 83, at 91 (1958).

international law is unsettled and in a confused state, the United States is still in a position, holding to the three-mile rule, to negotiate, seek concessions, and, in general, insure that its interests are protected from the adverse effects of an internationally recognized extension should it materialize.

B. Extensions of Baseline

Even though agreement on a breadth for the territorial sea is someday reached, that will not completely settle the problems in this area. So far we have been concerned with the outer limit or end of the territorial sea, but necessarily included in the breadth of this sea is the problem of its beginning; that is what is to be used as the inner limit, the starting point from which to measure the agreed-upon distance? What is the baseline?

While several methods by which to determine a baseline have been proposed,[54] there are, currently, two ways which have been internationally recognized. The difference

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54. At the 1930 Hague Conference the United States proposed an "arc of circles" method whereby a ship would simply draw a circle around itself, the radius thereof being the width of the territorial sea, and if the circle touched land at any place, the ship was within a territorial sea. This method was again introduced by the United States at the 1958 Geneva Conference. It failed to receive approval at either conference. In the meantime, Great Britain sought to rely on it in the Fisheries Case, [1951] I.C.J. Rep. 116. The court stated in its opinion that "It is not obligatory by law," and refused to follow it.

resulting from these two ways are often enormous. The first method has met with the widest usage. In this method the baseline follows the shoreline, curving in and out in accordance with the irregularities of the shore. While there has not been complete agreement among the nations using this method as to where the shoreline is -- high water mark, low tide mark, or where the sea becomes navigable -- the low tide line was adopted by the North Sea Fisheries Convention of 1882 between Great Britain, Germany, Belgium, Denmark, France and The Netherlands,[55] and has generally been adopted in the practice of states.[56] The second method for setting a baseline seems to have been established as far back as 1604 when King James I of England decreed that imaginary lines be drawn from headland to headland on the coast of England and proclaimed the waters landward of these lines to be "king's domain" or "king's chambers."[57] In modern parlance we would call them "internal waters." Although

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55. Convention for Regulating the Police of North Sea Fisheries, art. 2, Foreign Rel. U.S. 438 (1887).

56. [1951] I.C.J. Rep. 116, at 128.

57. 3 Gidel, Le Droit International Public de la Mer 505 (1934).

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the "king's chambers" doctrine was rejected in the arbitration between the United States and Great Britain concerning the ship Washington in 1854,[58] the headland to headland method of setting baselines continued to be used by some few nations. In 1949 a rebirth was given to this method when, in the Anglo-Norwegian Fisheries Case,[59] Great Britain contested a 1935 Norwegian decree in which the straight baseline method was used to delimit the territorial sea off Norway's northern coast. In a lengthy opinion which cites Norway's historic use of straight baselines, its economic advantage to the inhabitants of the area, and its usefulness in delimiting rugged coasts, the court determined, by ten votes to two, that the method employed for the delimitation of the fisheries zone by the decree was not contrary to international law.[60]

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58. 4 Moore, International Arbitration 4342 (1898). The Washington was seized while fishing in the Bay of Fundy, 10 miles off Annapolis, Nova Scotia, The British claimed that the bay was inland waters since a line drawn from headland to headland would have this effect. The arbiter found that the area was too large to be considered a bay.

59. Fisheries Case, [1951] I.C.J. Rep. 116.

60. Id. at 143.

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The opinion has been expressed that the courts finding "cannot be held . . .[to have] created a precedent since it dealt with a unique geographical configuration of a coast which -- as the court repeatedly said -- was 'exceptional'."[61] Logic and reasonableness, as well as the repeated statement of the court, uphold this opinion as to the application of the court's opinion. Some nations, however, seeking to extend their territorial seas, generally for economic reasons,[62] have ignored it and have resorted to the baseline system even though their coasts do not conform to the "exceptional" situation in the Fisheries Case. In April 1950, the Icelandic Ministries of Fisheries, relying on the pleadings of Norway in the Fisheries Case, issued regulations prohibiting all trawling and Danish seine-netting within an area four miles seaward of baselines drawn from the outermost points of its northern coast. Despite protests from other nations, on March 19, 1952, after the decision in the Fisheries Case,

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61. Colombos, International Law of the Sea 108 (5th ed. 1962) [hereinafter cited as Colombos].

62. See McDougal 409.

Iceland confirmed its previous action and extended it to all coasts.[63] Instead of smoothing out an exceptionally rugged coast, the Icelandic regulation had the effect of squaring off the coastline and including large areas of the high seas within their internal and territorial waters.

Canada has also declared its intention to use the straight baseline method. In his statement to the House of Commons,[64] Prime Minister Pearson said that:

> [T]he Canadian Government has decided to establish a 12 mile exclusive fisheries zone along the whole of Canada's coastline as of mid-May, 1964, and to implement the straight baseline system at the same time as the basis from which Canada's territorial sea and exclusive fisheries zone shall be measured.

Considering that Canada possesses the world's longest coastline,[65] it is readily apparent that this decision by the Canadian government, if recognized, will create large new areas of inland and territorial waters out of the high seas and close to free sailing numerous straits, passages, and bays.

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63. Laws and Regulations on the Regime of the Territorial Sea, U.N. Doc. No. ST/LEG/SER.3/6, at 516 (1956).

64. 108 H.C. Deb. 621 (1963), reprinted in 2 Int'l Leg. Materials 664 (1963).

65. Ibid.

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42. [illegible]

An interesting sidelight in this area is the case of California. As a result of the Supreme Courts decision in the tideland cases,[66] California acted to recover the territorial sea and other parts of the continental shelf which had thereby been taken away from her. Her method: in reliance upon the Fisheries Case she drew a straight baseline.[67] Thus she claimed to have pushed the territorial sea outward and to have recovered as inland waters, important parts of her previous territorial sea.

Other evidences of the rebirth of the straight baseline are the previously mentioned cases of the Philippines[68] and Indonesia.[69] Until December 13, 1957, Indonesia had claimed, as its territorial waters, a distance measured outward for three miles from each island. On that date the Council of Ministers of the Republic of Indonesia

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66. U.S. v. California, 332 U.S. 19, at 29-33 (1947).

67. Calif. Stats. 1949, c. 6s, p. 82, Sec. 1 (Calif. Gov't Code, Sec. 170).

68. See note 1 supra.

69. See p. 6 & note 2 supra.

declared[70] that, henceforth, the thousands of island making up the Republic would be considered as a single archipelago within straight baselines connecting the protrusions of the outermost islands. Thus, not only were all of the islands to be treated as a single unit, but all waters between those islands were to be a part of the same unit, and therefore, internal waters of Indonesia. The Council also, by this same declaration, sought to extend the territorial seas of Indonesia from a three-mile width around each island to a twelve-mile width measured outward from the newly declared straight baselines. On February 18, 1960, this declaration was reworked into a government order entitled "Regulation in Lieu of Act No. 4" and promulgated over the signature of President Sukarno.[71] A map was included on which the exact baselines were imprinted.[72]

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70. See note 12 supra.

71. Translation published in Addendum to Supp. to the Laws and Regulations on the Regime of the Territorial Sea, U.N. Doc. No. A/CONF.19/5Add. 1, at 3-4 (1960).

72. The essential features of this map are reproduced in Appendix B.

As might be expected, these unilateral declarations by the Indonesian government met with the disapproval of most of those maritime nations which had, throughout history, used the important and much traveled straits and waters around Indonesia.[73] In an effort to counter this dissapproval, proposals were submitted at the 1958 Geneva Conference which would have approved the Indonesian proclamation of December 13, 1957.[73a] These proposals were withdrawn,[74] however, and the legality of such an extension of territorial seas and inland waters has continued to be contested. Fortunately, Indonesia has not pressed its claim to such an extent that serious conflict would arise.[74a]

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73. For the United States response to the Indonesian claim see N.Y. Times, Ja. 18, 1958, p. 3, col. 1. For other protests see Syatauw, Some Newly Established Asian States and the Development of International Law 174-75 (1961).

73a. Philippine proposal of April 1, 1958, U.N. Doc. No. A/CONF.13/C.1/L.98 and Yugoslavian proposal of March 26, 1958, U.N. Doc. No. A/CONF.13/C.1/L.59.

74. The Philippine proposal was withdrawn on April 16, 1958, 1st Comm. Summary Rec., 3 Off. Rec. 148, U.N. Doc. No. A/CONF.13/39 (1958). AOn April 17, the Yugoslavian proposal was withdrawn presumably because the question needed "further study". Id. at 162-63.

74a. Syatauw, op. cit. supra note 73, at 175.

Both the International Law Commission and the 1958 Geneva Conference, authorized the use of the straight baseline method, but limited it to deeply indented coasts or situations where there are numerous coastal islands.[75]

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75. The articles of the Convention which are pertinent to the selection of a baseline read as follows:
"Article 3
"Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.
"Article 4
"1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
"2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.
"3. Baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them.
"4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.
"5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

From this wording a controversy has now arisen as to whether or not the straight baseline method can be applied to mid-ocean groups of islands.[76] In other words, does the Convention on the Territorial Sea and the Contiguous Zone authorize the use of straight baselines to connect the islands of an archipelago State? Considering the wording of the Convention itself, together with its close resemblence to the conclusion of the Internation Court of Justice in the Fisheries Case,[77] with its specialized geographical

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75. (Cont'd)
"6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.
"Article 5
"1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
"2. Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters."

76. See Sorensen, Law of the Sea, Int'l Conc. No. 520, at 239-40 (1958). The United States has its own internal problem in this regard in the form of the Hawaiin Islands. In 1963 an inter-island "sky bus" was placed in operation. Since the operations had tentative state approval but not federal approval, a dispute arose as to whether the plane was flying interstate (leaving the territorial area of Hawaii, flying over international waters, and then re-entering Hawaii) or intra-state (on the theory that the waters between the islands are a part of the state). The outcome of the case will be most interesting in view of the international declarations of the United States.

77. See p. 27 supra.

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situation, it is doubtful whether the Convention provision can be so interpreted.[78]

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78. The legality of use of the straight baseline method by oceanic archipelagoes is an unsettled question. For articles dealing with the question see Evensen, Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagoes, 1 Off. Rec. 289, 302, U.N. Doc. No. A/CONF.13/37 (1958); Sorensen, supra note 76, at 239; and Dean, The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas, 54 Am. J. Int'l L. 751, at 765 (1960).

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was to be interpreted."[3]

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Chapter III

ADVERSE EFFECTS OF EXTENSION OF THE TERRITORIAL SEA

A. General Introduction

From the foregoing it appears that efforts are being made to extend the territorial seas by many means, the two most important being by an extention of the breadth of the territorial sea itself and by the use of straight baselines from which to begin the measurement. The situation regarding the breadth of the territorial sea is in a state of flux but change from old accepted practices seems inevitable. This discussion of the adverse effects of the change is designed primarily to indicate why that change must be forestalled as long as possible. It should also point up areas in which action must be taken to preserve as many of the military advantages to the Free world of the three-mile limit as possible when greater limits become recognized in international law.

The nations of the world have been prompted to advocate a narrower or a broader territorial sea for a number of reasons. Chief among them are security, fishing, and economic factors other than fishing.

In 1702, the Dutch writer, Cornelius van Bynkershoek, authored the maxim "potestatem terrae finiri, ubi finitur armorum vis."[79] Although perhaps not literal,[80] this maxim may be contextually translated as "the territorial sovereignty ends where the power of arms ends."[81] This was an early expression of the concept that the territorial sea should be measured by the actual range of coastal cannon. Although impossibly wide breadths would now be required, the military consideration of "defendability," which set a narrow limit in 1702, is still being urged as the criteria to be used. Now, however, it is used to expand the breadth of the territorial sea for alleged security reasons.[82]

Despite the advent of intercontinental ballistic missiles and the accompanying reduction in the importance

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79. Bynkershoek, De Dominio Maris Dissertatio, first published in 1702 and reprinted in Opera Minora 364 (Editio Secunda 1744).

80. In a translation by Magoffin in The Classics of International Law 44 (Scott ed. 1923), the word "control" rather than "sovereignty" is used.

81. As interpreted by Walker, Territorial Waters: The Cannon Shot Rule, 22 Brit. Yb. Int'l L. 210, at 211-12 (1945).

82. See the Ceylonese and Saudi Arabian references to the cannon shot rule at the 1958 Geneva Conference, 3 Off. Rec. 27, 36. U.N. Doc. No. A/CONF.13/39 (1958).

of a wide territorial sea for protective purposes, security remains as a major consideration for some nations.[83] Those who are apprehensive about the use of large fleets against them, such as the use of the United States fleet off Lebanon in 1958, assume that those nations who advocate a narrow limit do so for military or political reasons inconsistent with the security of the coastal nation. Such nations, stressing the proximity of large fleets, urge a broader territorial sea in order to move the threat further away. Opposed to this rationale are those nations which see a greater threat to their own security in the broad territorial sea.[84] For instance, the United States has urged the retention of the three-mile limit in order to protect against an increase in violations of neutral waters and in order to ensure the unrestricted use of as many straits and sea areas as

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83. For a general discussion asserting the absence of a modern need for a wide territorial sea for defense purposes in view of modern weapons, see McDougal 516-20.

84. In a statement made before the Senate Foreign Relations Committee on January 20, 1960, Mr. Dean has commented that "U.S. defensive capabilities would be so profoundly jeopardized by our acceptance of a greater than 6-mile territorial sea that those responsible for planning for our defense have concluded that we must take a position against such a course in any event." 42 Dep't State Bull. 251, at 260.

possible for the effective operation of a deterrent fleet and its supporting merchant vessels.

There are numerous economic effects which would result from an increase in the breadth of the territorial seas, such as the increased cost of navigational aids, the expense of rerouting airlines to avoid illegal overflight, the rerouting of merchant ships to avoid hampering regulations, and loss or increase of subsurface maritime wealth including fish, other sea life and minerals. The effects of military significance, however, can for the most part be classified under one heading: passage. Is there innocent passage in territorial waters, and, if so, what is innocent and what is passage? What limitations can be imposed upon passage by the littoral state? How can these limitations affect deployment and mobility of a sea or air force? What effect does neutrality have on passage?

In considering all of these matters, there is one observation that must be kept in mind. There is a tremendous contrast between the geographic situation of the Free world and that of the Communist bloc. For the most part, the Communist world is in a neat package of land-

possible for the effective operation of a telephone plant and its accounting personnel records.

There are numerous unnamed effects which would result from an increase in the standard of living [illegible] alone, such as the increased cost of maintaining safety, the expansion of personnel training to avoid illegal practices, the conversion of accounting units to avoid [illegible] taxes, and [illegible] of accounting practices [illegible]. The effects of military significance, however, are far the most [illegible] to [illegible] under any condition. Assuming, if there [illegible] material to [illegible] exists, and, if we [illegible] to [illegible] and [illegible] [illegible]. One can [illegible] with [illegible] by the [illegible] effect. One can [illegible] [illegible] effect [illegible] the utility of a man or his tools. This effect [illegible] be [illegible].

In considering all of these factors, there is one [illegible] that must be kept in mind. There is a [illegible] relation between the [illegible] efficiency of the [illegible] and that by the [illegible] [illegible]. [illegible] [illegible], the [illegible] [illegible] it is a [illegible] [illegible]

connected states. True, it is gaining a few unconnected outposts now, such as Cuba, and possibly Zanzibar, but the great bulk of the Communist states are still connected by railways, highways, and transcontinental airways. Opposed to this, the Free world is an oceanic confederation. Its connecting lines are oceans and straits.

Survival of the Free world nations is dependent upon their freedom to use the seas.[85] One may thoughtlessly argue that the sea is a large place and the loss of three million square miles of free sea by the extension of territorial limits would still leave plenty of room. It is not a question of having plenty of room. It is a question of having room where it is needed. By simple mathematics, surveillance of a coast line, whether from the air or sea, is nine miles better from three miles off the coast than it is from twelve, and adequate photographic and visual intelligence are vital to many military operations. Conversely, of what good as a show of strength is a fleet stationed so far off-shore that it cannot be seen.

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85. See Eller, Implications of Soviet Sea Power, published in The Soviet Navy 299, at 304-09, 326-27 (Saunders ed. 1958), for a fact-filled article supporting the assertion that the Free world is an oceanographic confederation dependent on sea communications.

Consider also the fate of unhampered passage through straits. Of the thirty-eight leading straits in the world, one study has shown that only three would remain open as high seas under a twelve mile territorial sea regime.[86] Most of the maritime highways of the world would fall within the restrictions of territorial waters if the breadth of such waters were extended to twelve miles.[87]

Relying on this difference in geographic configuration, the Communists may well be seeking to weaken the Free world's lines of communication and to restrict the effectiveness of its defenses by broadening territorial seas.[88]

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86. See Kennedy, A Brief Geographical and Hydrographical Study of Straits Which Constitute Routes for International Traffic, U.N. Doc. No. A/CONF.13/6Add. 1 (1957), published in U.N. Doc. A/CONF.13/37, at 114 (1957). See Appendix A for examples of affected straits around the world.

87. See Dean's statement before the 4th meeting of the Committee of the Whole on March 20, 1960, 1960 Off. Rec. 46, para. 11, U.N. Doc. No. A/CONF.19/8; statement of Faris Bey el-Khouni, 1 ILC Yb. 213 (1956).

88. See Nicholl, Geography and Strategy, published in The Soviet Navy 243, at 244 (Saunders ed. 1958), where R/ADM. Nicholl states that "by every conceivable means of diplomacy, subversion, propaganda and by the active support of nationalist movements [Russia]. . . has sought, not without success, to weaken the network of bases available to the rest of the world." "Her object is to ensure that her naval forces are in a position to cut the vital sea communications of the NATO powers."

The Russian leaders are not unaware of the dependence of the Free world on communications. Rear Admiral Andreev of the Soviet Navy has stated that American troops abroad and all of the NATO Allies are so dependent upon trans-oceanic supply that they "cannot conduct wide scale combat operations" without it. According to the Admiral "the very possibility of conducting war depends [for the 'imperialist' states] upon the support of uninterrupted operation of sea and ocean communications."[89] "The Soviet leaders have thoroughly grasped the main lesson of both world wars, namely, that the Allies were very nearly defeated at sea, and only achieved victory by making a supreme effort to control their sea communications."[90] Realizing these facts, Soviet strategists have given to their submarines, as one of their substantial missions, the interdiction of the sea communications of the Free world.[91]

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89. Andreev, Sea and Ocean Communications in Contemporary War, Krasnaia Zvezda, April 25, 1957, quoted in Garthoff, Soviet Strategy in the Nuclear Age 202 (Rev. ed. 1962).

90. Nicholl, supra note 88 at 243-44.

91. Garthoff, supra note 89. For another recent appraisal of the role of the Soviet submarine see Macintyre, The Submarine Threat, published in The Soviet Navy 168 (Saunders ed. 1958).

B. Innocent Passage

Innocent passage is a Pandora's box of troublesome problems, the top of which will be opened even further by the extension of territorial limits and more of its contents will pour out to plague international harmony. The legal issues involved in innocent passage problems, to one extent or another, embrace most of the ills, of a military nature, evolving from an extension of territorial seas. It is, therefore, the first area of concern to be discussed in detail. Other effects will later be singled out for comment, but primarily as applications of the legal issues to be discussed in this section.

At the outset it will be advantageous to consider three matters which are <u>not</u> included in the so-called "right" of innocent passage: Submerged passage, overflight, and internal waters.

1. <u>Submerged Passage</u>

Under article 14, paragraph 6, of the Convention on Territorial Sea and the Contiguous zone, "Submarines are required to navigate on the surface and to show their flag" when operating within the territorial waters of another state. The requirement that a submarine navigate on the surface in territorial waters unless it has permission to do otherwise is a well-recognized customary rule

in international law and was recommended by the International Law Commission.[92] Recognition of the rule by the United States is evidenced by Navy Regulations[93] which direct: ". . . nor shall submarines be submerged within . . . territorial waters without . . . permission [from the government of the country concerned.]" While violation of this rule is rather easily accomplished, and of great benefit to the violator, as will be discussed later, its violation, when detected, is considered a serious matter. Note, for instance, an Argentine response to a suspected submersion. According to an Argentine government report, on May 21, 1958, an unidentified, submerged submarine was sunk by Argentine vessels within territorial waters because it had not surfaced and shown its flag as required.[94] While later information disclosed that the supposed submarine was merely a false contact, the incident illustrates

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92. Articles Concerning the Law of the Sea, sec. 15(5), U.N. Doc. A/CONF.12/32 (1958).

93. U.S. Navy Regulations, 1948, sec. 0622(4).

94. See N.Y. Times, May 24, 1958, p. 1, col. 6, for a report of this incident.

the seriousness of detected disobedience. Thus, for a country that is concerned with world opinion and is trying to abide by international law, a submarine must rise and proceed to navigate on the surface where its agility is decreased.

Under present day conditions, why is such a rule necessary? If the commander of a submarine wishes to pass innocently through a territorial sea, what difference does it make whether he is under or on top of the sea? The main difference, of course, is that his presence, nationality, and purpose is more obvious if he is surfaced. Does this requirement really protect the coastal state today? If the submarine is present to launch an attack, a mere twelve miles is not going to stop it. Missiles fired from submerged submarines have a greater range than that. There is no longer the need in every instance for risking the dangers of coming into a harbor or close to shore in order to strike. And if close proximity is required, a surfaced submarine can get closer to its target in peace time. Since the main danger in peacetime is from surprise attack and that cannot be eliminated by a twelve-mile territorial sea, do not the inconvenience of the rule to the submarine outweight its benefits to the coastal state? True, if a submarine must

surface while going through a strait, a migration of submarines from one area to another would be more easily detected, but if the purpose of the migration were an attack, there is little reason to anticipate compliance with the surfacing requirement anyway. Coastal underwater detection devises are not yet so effective that a submarine is deprived of a better chance of secrecy if submerged.

Under wartime conditions the only application of the rule would be in neutral waters. While the rule is justified as a protection against violation of neutral waters, this situation does not justify a blanket rule covering other situations as well.

2. Overflight

Another area where innocent passage has no application, is in overflight. An airplane has no right of innocent passage over the territorial waters of a nation.[95] The result of this restriction is drastic. A submarine can surface and become entitled to the same right of innocent passage as a surface warship. An airplane is dependent upon treaties and agreements.

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95. 1 Oppenheim 523; McDougal 486.

Although eminently important in all types of transit, whether on, under, or over the sea, it is in this area of overflight that certain geographical facts of life are most poignant. Most of the more important narrow passages connecting important bodies of water are high seas under a three-mile territorial limit and territorial waters under a twelve-mile limit. Of more than one hundred important international straits that are now high seas, more than fifty would become territorial seas under a six-mile rule and all would be reduced to territorial seas if a twelve-mile limit were recognized.[96] Thus, birth of a twelve-mile territorial seas would signal the death of over one hundred strategically and economically important air routes.[97] Planes can either go around nations, traversing the high seas, or they can become dependent on agreements and treaties -- tolerance and cooperation -- for their operations.

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96. Franklin, op. cit. supra note 45, at 90; Dean, Statement before Senate Foreign Relations Comm., Jan. 20, 1960, 42 Dep't State Bull. 251, at 260.

97. See appendix A for a partial listing of these affected areas.

In one of his articles subsequent to the 1958 Geneva Convention, Mr. Dean summarized the current situation with regard to airplanes by saying that "there is no right for aircraft to overfly another nation's territorial sea except under a treaty, with its consent, or pursuant to the Chicago Civil Aviation Convention of 1944 as to the contracting parties thereto."[98](citation omitted) Inasmuch as this Convention[99] is a prominent source for the right of overflight, it is well to note two facts about it. First, almost all Communist bloc countries are not signatories and are thus not bound by its terms and grant of privileges. Second, article 3(c) thereof provides that, "No state aircraft [including military aircraft] of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof." As to military aircraft, at least, there seems to be little room for doubt. There is no right in the absence of special agreement.

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98. Dean, The Geneva Conference on the Law of the Sea: What Was Accomplished, 52 Am. J. Int'l L. 607 at 610 (1958).

99. Convention on International Civil Aviation, April 4, 1947, 61 Stat. 1180; T.I.A.S. No. 1591; 15 U.N.T.S. No. 295.

Again, as with submarines, the question may be asked: Why? Why not allow innocent passage of military airplanes?[100] It is conceded, to begin with that overflight must be subject to some controls by the coastal state or an international body set up for that purpose in order to provide for air safety, to protect against nuisance, and to close certain security areas not customarily used for overflight. Aside from these factors, with which aviation has long had to contend, what purpose is now served by the denial of the right of innocent passage? Two purposes come to mind. First, the denial affords a nation the opportunity to flex its international muscles by asserting its national sovereignty. This hardly seems to be adequate justification for the denial. Secondly, it provides some measure of secrecy by protecting against the gathering of

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100. In view of the shooting down of an unarmed United States training plane over East Germany in January 1964 when it lost its bearings due to radio failure, it is recognized that the task of convincing the Soviet bloc to give up the prohibition against overflight in its territorial sea may well be impossible, N.Y. Times, Jan. 30, 1964, p. 1, col. 4.

coastal intelligence by aerial reconnaisance. When one stops to think about it, however, there is little difference except for the angle of view between a fishing boat plying the waters a mile or so off the Florida coast and an airplane a mile or so above it.

This angle, of course, may be all important, but is the need for security from the prying "eyes" of an airplane on the coast of such great importance that a coastal boundary should be given greater protection than a land boundary? States bounded by land have no extra distance for protection along such boundaries.

3. Internal Waters

The third area that is exempted from the burden of innocent passage rights is inland waters. Under most circumstances, inland waters are not affected militarily by an extension of the territorial sea. There are two important exceptions, however. One occurs where the opening to an area of water was too broad for that water to be classified as a bay under a narrow limit but narrow enough to become a bay under a broad limit. In such cases not only does the extension of the territorial limit create a bay out of the high seas, but it also causes the outer limit of the territorial sea to be measured from the mouth of the bay rather than from the shore. A

second exception, with more serious consequences, arises where the territorial sea is extended by the use of straight baselines. The circumstance in Indonesia has been discussed previously[101] and is an excellent example of this exception. By its proclamation,[102] Indonesia has attempted to create an area of internal waters over which it would have complete sovereignty. If this extension is recognized, Indonesia will become a country that is predominantly under ocean water, and the trading nations of the world will be deprived of the free use of historic and well-traveled high sea trade routes.

The general rule that there is no innocent passage in inland or internal waters has been limited by both consent and convention. Indonesia is also an example of the consent exception. Article 3 of Act No. 4[103] provides that "(1) Innocent passage in the inland seas of Indonesia is open to foreign water transport. (2) Innocent passage as referred to in clause (1) can be regulated by a Government Regulation." Such regulations were promulgated as

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101. See pp. 30-31 supra.

102. See note 12 supra.

103. See note 2 supra.

Government Ordinance No. 8 on July 28, 1962.[104] In these regulations there are provisions in article 4 for the prohibiting of peaceful passage. Article 7 particularly restricts innocent passage for military ships. It provides that:

> (1) Before undertaking a peaceful passage in the sea territory or internal waters of Indonesia, the foreign warships and Government vessels that are not merchant ships must first notify the Minister/ Chief-of-Staff of the Navy, unless the said passage is along sea lanes which have been or will be determined by the Minister/Chief-of-Staff of the Navy.
> (2) When crossing through Indonesian waters, foreign submarines must sail on the surface of the water.

In the Explanatory Memorandum on Act 4,[105] the Indonesian government is explicit in pointing out that this grant of innocent passage in internal waters is designed to stimulate commercial shipping and, since it pertains to inland seas, that "Indonesia may withdraw the facilities granted." It would seem quite clear that Indonesia feels it has made these concessions as a matter of grace and not in recognition of the rights of any other nation.

At the present time, of course, Indonesia's feelings at to grace are quite correct. It has acted as a matter

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104. Stat. Bk. (1962) No. 36.

105. Contained in annex to Circular No. H. 248 of the Commercial Advisory Foundation in Indonesia.

of grace, albeit a grace prompted by economic necessity. During the seventh session of the International Law Commission, it was decided to make provision for innocent passage through waters that would become internal as a consequence of using the straight baseline method of determining territorial seas.[106] Essentially, article 5 of the Convention on the Territorial Sea and the Contiguous Zone[107] is an adoption of the Commission's decision. Thus, by convention, there may be a right to innocent passage in internal waters.[108]

4. Surface Passage

Article 14 of the Convention on the Territorial Sea and the Contiguous Zone provides, in part, that "ships of all States . . . shall enjoy the right of innocent passage through the territorial sea." This expresses, in a few words, the general rule of customary international law. In practice, however, the matter is not as simply stated. The portion of the article quoted contains three

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106. International Law Comm'n, Report, U.N. Gen. Ass. Off. Rec. 8th Sess., Supp. No. 9, at 4 (A/3159).

107. Note 75 supra.

108. Inasmuch as established international law contains no such right in internal waters, the Convention does not speak as law until it enters into force upon sufficient ratification. See note 34 supra.

[illegible]

words the interpretations of which have caused anything but a uniform conclusion among legal authorities and nations. These three words are: innocent, passage, and ships.

a. What is Innocent?

The article itself attempts to define the word "innocent." It states, in paragraph 4, that "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these article and with other rules of international law."[109] Mr. Yingling, a United States' delegate, expressed the view, in the debate on this paragraph, that the sole test of the innocence of a passage was whether or not it was prejudicial to the security of the coastal state. He defined the word

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109. Inasmuch as the only specific reasons for denying such passage are the peace, good order, and security of the coastal state, as innumerated in the article, the additional words "other rules of international law" would seem to be merely redundant and not suggestive of other qualifications. There was at the conference, however, an insistance by a number of delegations that these words were necessary. In a debatable situation, then, one may expect to be faced with an argument, based on "other rules of international law," in an attempt to broaden the justification for a denial of passage on the basis that it lacked innocence.

security as applying to military security or other threats to the sovereignty of the coastal State and not to economic or ideological security.[110] In making this statement, Mr. Yingling was addressing himself to a United States proposal which omitted the words "peace, good order or" as well as "and with other rules of international law." In view of these amendments, Mr. Yingling's sole test becomes only one of several tests. In addition, the passage must not violate the peace and good order of the state. These are tremendously important additions for they cultivate wide fields, fertile for the raising of objections to passage. There are, of course, obvious actions which would be to the prejudice of peace, good order and security. But who is to define these terms in less obvious cases? In the final analysis it will in most cases by the judicial or executive authorities of

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110. 1st Comm. Summary Rec. of Meetings and Annexes, 3 Off. Rec. 82-83, U.N. Doc. No. A/CONF.13/39 (1958).

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[1]0. See Chem. Chemistry Corp. et Chemistry and Industry, [illegible] Sec. Sec. [illegible], [illegible] Sec. [illegible] 1[illegible]9 (1[illegible]).

the coastal state.[111] This would be particularly true where the vessel concerned is not government owned since a privately owned ship does not have the same immunity from seizure granted to a government owned ship. Whether owned privately or by the government, however, the whole tenor of the Convention and the debates accompanying its formation point to a conclusion that the decision of the coastal state as to its own peace, good order and security will at least be given great weight if an international decision is necessary. The coastal state controls the innocence of the ship in another way, also. In a later section the controls and regulations that a state may impose will be discussed. It will suffice here merely to note that should a passing ship fail to comply with

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111. See McDougal 66, where it is stated that "the authority accorded a coastal state in the territorial sea, is and must be, very comprehensive indeed, extending even to a substantial measure of discretion in determining the innocent character of a particular passage. . ." These authors also see in art. 14(4) of the Convention on the Territorial Sea and the Contiguous zone considerable authority [for the coastal state] to qualify passage as non-innocent." Id. 67. At the 1958 Geneva Conference, Mr. Yingling voiced the United States position that in the first instance, the determination as to whether a passage was innocent or not was up to the coastal state. 3 Off. Rec. 84, U.N. Doc. A/CONF.13/39 (1958).

[illegible]

regulations lawfully imposed by the coastal state, its ship's passage is no longer innocent.[112]

b. What is Passage?

Having once found that the transit is innocent, it must then be determined that it is passage. Innocent intentions alone do not qualify a ship for innocent passage. Here again, the article itself affords some help. One paragraph contains the definition that, "passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters."[113]

While there is no express statement that navigation must be by direct routes, the reasonable implication of the wording is that the ship must take a route which will accomplish the traversing without undue time spent in doing it. This conclusion is strengthened by the next paragraph in the article which dictates that, "passage includes stopping and anchoring, but only in so far as the

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112. Convention on the Territorial Sea and the Contiguous Zone, April 12, 1961, art. 17, U.N. Doc. No. A/CONF. 13/L.52 (1958).

113. Id., art. 14, para. 2.

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112. Conversation on the Telephone (New York: G. P. Putnam's Sons, 1878), 117-118.

113. Id., vol. II, p. 4.

same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress." Thus it would seem that drills, such as "man-overboard" or "zig-zag", and military exercises could not be conducted in territorial waters. While they are innocent, because they are not directed against the peace, good order, or security of any state, still they are not passage and are forbidden in the absence of agreement.

c. Are Conventional Warships Included?

The interpretation of the word "ships" has the greatest military consequence. The main question is, does it include warships? Merchants ships clearly have the right of innocent passage. Do warships?[114] There is a great split among authoritative writers in international law as well as among nations.[115] One early authority contended that warships do not have the right of innocent passage.[116] A noted English authority finds that

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114. At the 1958 Geneva Conference the Russian delegate expressed, as the Soviet position, that innocent passage pertained only to merchant ships and not to warships. 3 Off. Rec. 32, U.N. Doc. No. A/CONF. 13/39 (1958).

115. For a more complete discussion of the conflicting views of legal writers see 1 Bruel, International Straits 123-43 (1947). Bruel's conclusion was that "a right proper for warships to pass through territorial waters cannot yet be assumed to exist." Id. 230.

116. Hall, A Treatise on International Law, 198 (8th ed. Higgins 1924).

> [T]he question is controversial whether they enjoy the same right of innocent passage [as merchant ships]. The better view appears to be that such user should not be denied in time of peace when the territorial waters are so placed that passage through them is necessary for international traffic.[117]

That he is definitely restricting the innocent passage of warships is borne out by his later comment that,

> . . . a distinction ought to be drawn between warships and merchant vessels. The reason for granting this right [of passage] to merchant vessels is mainly that sea navigation ought to be free and that trade communications should not be interrupted between the various parts of the world. Moreover, the presence of powerful warships in territorial waters and only three miles distant from the shore may prove a serious danger to small nations. It is, therefore, reasonable to concede to a State the right to enact regulations regarding the passage of foreign warships through its territorial waters, if considerations based on its safety and protection justify it.[118]

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117. Columbos 121.

118. Id. 238. While it is reasonable to agree with the conclusion stated, it seems unreasonable to agree with the implication that the reasons stated justify a distinction between warships and merchant vessels. "That sea navigation ought to be free" is a commendable goal, but it applies to warships as well as merchant vessels. "That trade communications should not be interrupted" is also a commendable goal, but one which can be retained, under present conditions, only if our navies have the freedom of movement necessary to protect shipping. As to the third reason, where is the danger in having warships offshore if they are in innocent passage?

Another noted current authority concludes that "under customary international law . . . coastal states do not possess an arbitrary competence to deny passage to warships."[119] This same authority, however, believes that "there is a considerable body of opinion that . . . [warships have] no right of passage through the territorial sea."[120]

A third current authority in international law, writing before the 1958 Geneva Conference, has stated that"a right for the men-of-war of foreign States to pass unhindered through the maritime belt is not generally recognized."[121] He continues by saying, however, that,

> As a rule, . . . in practice no State actually opposes in time of peace the passage of foreign men-of-war and other public vessels through its maritime belt. It may safely be stated, first, that a usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace; and, secondly, that it is now a customary rule of International Law that the right of passage through such parts of the maritime belt as form part of the highways for international traffic cannot be denied to foreign men-of-war.[122]

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119. McDougal 221.

120. Id. 485

121. 1 Oppenheim 494.

122. Ibid.

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111. Supra at [illegible].

112. [illegible]

113. 1 Commonwealth [illegible].

114. [illegible].

It is unfortunate that all nations do not agree with this general rule. In actual practice, the policies of nations have been as diverse as the statements of the experts.[123] In 1910, Elihu Root expressed what was then the traditional United States position as follows: "Warships may not pass without consent into this [territorial sea] zone, because they threaten. Merchantships may pass and repass, because they do not threaten."[124] By the time of the Hague Codification Conference in 1930, the United States had altered its view only slightly. It then considered that warships could pass as a matter of courtesy but not as a matter of right.[125] Article 12 of

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123. For the 1929 position of a number of states see 2 Basis for Discussion, Conference for the Codification of International Law, League of Nations Pub. No. C. 74.M.39.1929.V.

124. XI Proceedings, North Atlantic Coast Fisheries Arbitration 2007; S. Doc. 870, 61st Cong., 3d Sess. (1910).

125. See the Russian statement of the U.S. policy at 2 Off. Rec. 68. The present U.S. position is that warships do have a right of innocent passage through territorial seas. See 2 Off. Rec. 67-78. This position is supported by "strong legal arguments." McDougal 556. Apparently, however, the U.S. fears that disagreements among nations as to the right will, as a practical matter, make effective invocation of the right impossible. Ibid.

[illegible] [illegible] [illegible] [

the draft convention prepared by the Hague Conference is an expression of this position. In part, it provides that "as a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea, and will not require a previous authorization or notification. The coastal State has the right to regulate the conditions of such passage."[126]

The International Law Commission arrived at essentially the same conclusion[127] as the Hague Conference. When the Commission's draft was studied by the 1958 Geneva Conference, however, dispute arose as to the requirement of prior authorization or notification. Some delegations contended that prior authorization was required. Others required only that prior notification be given the coastal country. Still others held to the conclusion that no clearance procedure is necessary as a prerequisite to innocent passage of warships.

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126. Draft Convention, Art. 12, League of Nations, Pub. No. C., 1930, vol. 9, as quoted in Colombos 238.

127. Article 24 of the Commission's proposed draft reads: "The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of articles 17 and 18."

the court's conviction reversed in the Ninth Conference in
an expression of their position. In part, it provides
that for a reduced rate, a casual rate will not record
the passage of Freight Condition in its Electrical Law,
and will not require a private enforcement or modi-
fication. The Council plays the right to regulate
the activities of such persons.[12]

The Interstate Law Commission realized at Washington
Utility for such conclusion[13] as the Basic Conference.
When the Commission's Court has studied by the Fifth Centre
Conference, however, Illinois broke to be the employment
of rules authorities to Notification. Some delegations
commented that prior information was required. Others
reported only that rules concerning be given the normal
country. Only Mexico said as the commission took no
clearance questions is necessary as a prerequisite to
imposing penalty of control.

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[12]. North Carolina Act. 12, Congress of Nations, Pro-
ce. T., 1975. ent. v. as cancel to Colorado Sup.

[13]. Article 2 of the Commission's proposed draft Penal
"The Federal State to this the passage of Authority
through the Secretary was subject to petitions
authorization by notification. Usually it shall
grant licensed persons rights to the construction
of the provisions of relations if need is."

By the time of this conference the United States had swung over to the latter view and was joined by a sufficient number of states so that, when the matter of authorization and notification came on for a vote, they failed to receive the two-thirds majority required. This cannot be interpreted as an affirmance of the "no clearance" policy. It simply means that the Conference could not reach agreement and, therefore, the Convention is mute. A look at the proceedings of the committee which studied the Convention leads to the conclusion that a majority of the delegations may not have intended that warships should have a right to innocent passage[128] and it has been vigorously argued that the proceedings clearly show that they do not have such a right.[129]

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128. Professor Sorensen summarizes the situation by saying, "Consequently, the Convention as it now stands contains no special provision relating to the innocent passage of warships, but only the general rules applicable to all ships. The actual text of the Convention would therefore warrant the conclusion that warships have the same rights in this respect as other ships, but the proceedings of the Conference leave no room for doubt that this was not the intention of the majority of delegations." Sorensen, Law of the Sea, Int'l Conc. No. 520 at 235 (1958). McDougal specifically qualifies Sorensen's conclusion by stating that"the predominant expectation of states [at the 1958 Conference], therefore, appears to be that warships have a right of access to the territorial seas, subject to notification." McDougal 220. Thus, even if the right exists it is not unqualified.

129. See comment by Dr. El-Erian of Egypt in U.N. Gen. Ass. Off. Rec. 13th Sess., 6hh Comm., 14 (A/C.6/SR. 590) (provisional record) (1958).

Discussion thus far has included conflicting authorities and a currently mute convention. While these are indicative of a theoretical conclusion, based on an interpretation of the minutes of the Conference a more practicle determination of whether or not a state can rely on the innocent passage of warships unhampered by clearance requirements can be found in the actual practice of nations. As stated above, many coastal states do not afford the right of innocent passage to warships. That it may only be a simple majority rather than a two-thirds majority is little consolation in our concern for unhampered freedom of innocent passage. It is not the number who maintain controls as much as it is their location and power.

In this connection it is significant to note that with the exception of Poland, all of the communist nations that signed the Convention reserved the right of the littoral state to determine whether or not warships might pass through their territorial sea and, if so, how they might do it. Other states have expressed their intentions in other ways. An example is Ghana's amendment to the United States-Canadian "six plus six" proposal at the 1960 Geneva Conference.[130] Ghana would have required prior notification.

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130. U.N. Doc. No. A/CONF.19/L.10 (1960).

d. Are Atomic-Powered Warships Included?

Most of the discussion in the foregoing subsection had only conventional warships in mind. With the advent of atomic-powered warships a new reason for desiring more abundant high seas and a corresponding decrease in coastal state-controlled territorial waters has come into existence.

The question of whether an atomic ship is to be treated any differently in international law than a conventionally powered ship[131] has received recent attention in international conferences and treatises. As a result, on May 25, 1962, the Brussels Convention on the Liability of Operators of Nuclear Ships[132] was opened for signature. During the conferences which formulated this Convention, the United States opposed its application to warships. However, the Convention was made applicable to warships as well as merchant ships and the United States did not

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131. While the Convention on the Territorial Sea and the Contiguous Zone, art. 16, para. 3, requires that, if innocent passage is to be suspended, it must be done "without discrimination amongst foreign ships," this admonition would seem to apply to equal treatment of nations rather than types of warships.

132. Reprinted in 57 Am. J. Int'l L. 268 (1963). For more complete information on the Convention see Konz, The 1962 Brussels Convention on the Liability of Operators of Nuclear Ships, 57 Am. J. Int'l L. 100 (1963).

[illegible]

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[illegible]

sign it. Joining the United States in a refusal to sign was the Soviet Union. Thus, neither of the states which possesses nuclear-powered ships agreed to be bound.

As indicated by the title of the Convention, it deals mainly with financial liability. This is typical of most of the discussion in this area. Very little has been said, directly, with regard to the right of nuclear-powered ships to innocent passage and legally acceptable excuses for denying such passage. Perhaps an indication of the status which a nuclear warship may be expected to have in territorial waters may be gained from the fact that the United States has found it necessary, before sailing the nuclear merchant ship Savannah into foreign waters, to conclude specific agreements with the coastal states.

Because of the breadth of its terms, the United States' agreement with the Federal Republic of Germany[133] is of particular note. In addition to indemnification for loss in case of nuclear accident, this agreement makes entry into the coastal waters of Germany subject to prior German approval and inspection, including access to operational records. Even when approved, the ship must follow special

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133. Agreement with the Federal Republic of Germany on the Use of Territorial Waters and Ports by the N.S. Savannah, Nov. 29, 1962, 13 U.S.T. & O.I.A. 2567, T.I.A.S. No. 5223.

13/. Expressing also the reduced possibility of obtaining an
[illegible] [illegible] [illegible] [

instructions as to routes, pilotage, tug assistance, and other similar matters.

From these indications it is apparent that not only will nuclear ships be required to conform to more stringent rules than conventionally-powered ships but that the coastal states may have virtually unlimited power to effectively deny passage on grounds of security and safety. It is doubtful that the right of inspection could be made to apply to warships because of their traditional immunity. However, since a number of nations require prior notification or authorization even from conventional warships, it is not hard to imagine that serious attempts will be made to impose this requirement on nuclear-powered warships.

e. Closure of the Territorial Sea

In addition to the highly questionable status of the right of warships to innocent passage,[134] there are at least three other important reasons why innocent passage through territorial seas is a poor substitute for free use of high seas.[135] These reasons are the right of the coastal state to close its seas, the right of the coastal

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134. See 1 Oppenheim 853.

135. In listing the authority which a state has within its territorial sea, McDougal gives examples of

state to impose regulations on the use of its seas, and the effect of wartime conditions on passage.

The littoral state has the right to take such action as is necessary within its territorial seas to protect itself against any acts prejudicial to its security. This includes the right to restrict temporarily, or to completely suspend for a temporary period, innocent

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135. (Cont'd)
nine reasons why a territorial sea is a poor substitute for free high seas. They are:
"1. Exclusive rights of exploitation and control over animal and mineral resources of the marginal belt;
"2. The competence to exclude passage through the marginal belt by qualifying the character of the passage sought or, under some conditions, by suspending any passage at all (the coastal state has a wholly discretionary authority to exclude any passage by aircraft);
"3. Authority to subject navigation in the belt to the regulation of the coastal state;
"4. An indeterminate competence over events and persons aboard passing vessels;
"5. An equally indeterminate competence over the vessel itself for the purpose of judging claims against it;
"6. A competence commensurate with the obligation to maintain safety of navigation in the belt;
"7. Authority to protect against pollution from passing ships;
"8. Authority to prescribe and apply regulations concerning security, customs and health;
"9. Authority to control belligerent use of neutral waters, a control that might be onerous and even embarrassing to the claimant during times of violence." McDougal 72. All but items 1, 4, and 5 apply to warships.

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passage in definite areas.[136] The 1930 Hague Conference on Codification produced the first general indication that there was a growing concensus among states to the effect that a state could suspend the passage of warships through its territorial seas.[137] Article 16 of the Convention on the Territorial Sea and the Contiguous Zone gives further expression to this right and added to it certain limitations to ensure fairness.[138]

The article goes on to codify an important exception to the general right of closure. Paragraph 4 states that:

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136. See Colombos 120-1; Brittin & Watson, International Law for Seagoing Officers 65-8 (2d ed. 1960). McDougal 181, where it is claimed that "a state may assert authority to deny passage by virtue of its general competence to prescribe for events within the territorial sea," or on the basis that the passage "has prejudicial impact on local security and other interests" or on the grounds that it is "non-innocent." These three grounds are termed "functional equivalents."

137. McDougal 202.

138. Art. 16 provides, inter alia, that "Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published."

[illegible]

> There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state.

In this area, too, there have been disputes over the status of warships. The better opinion, supported by the decision of the Internation Court of Justice in the Corfu Channel Case,[139] is that innocent passage cannot be denied to foreign warships if the area is actually a strait and is customarily used in international traffic.[140] This case arose out of a series of transits by warships of Great Britain through Corfu Channel, the territorial waters of Albania. On the first entry of British ships, Albania had fired at them from the shore. On October 22, 1946, Great Britain sent a second group of ships through the channel with the announced intention of firing back if fired upon. Albania did not open fire but the fleet ran into a field of anchored automatic mines in the Corfu Strait, heavily damaging HMS Saumarez and causing some

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139. The Corfu Channel Case, [1949] I.C.J. Rep. 4.

140. See Colombos 237; 1 Oppenheim 511.

[illegible]

damaging of HMS Volage. Great Britain then sent mine-sweepers through the Channel in order to gather evidence. In expressing its view, the International Court of Justice declared that:

> It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.[141]

Based on this statement of the law, the court concluded that the second passage was innocent even though the purpose of the passage was to test the peaceableness of the coastal country but the third passage, to gain evidence, was not innocent.

The court was also of help in settling the question as to what is a strait. According to the court, the criteria for determining whether a strait is international is in "its geographical situation as connecting two parts of the high seas and the fact that it is being used for international navigation."[142]

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141. [1949] I.C.J. Rep. 4, at 28.

142. Ibid.

f. The Right to Regulate

Although warships have a better right of innocent passage in straits than they do in ordinary territorial sea, even here that right is not unqualified. The warship must still obey the regulations of the coastal state if it is to retain its innocent status.[143] Specifically, the coastal state may limit the number of warships which it will allow to use the strait at any one time and the length of their stay.[144] It may also prescribe definite routes to be followed during their passage.[145]

These two regulations have their particular applicability in straits, but they have their counterparts, and many more besides, in the multitude that littoral states may prescribe for their territorial seas in general. They may make regulations concerning the rules of the road, use of radar, obligatory pilotage, the exclusion of

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143. See McDougal 259, where it is stated that "there can be no doubt that coastal states can make compliance with some coastal laws a precondition to innocent passage."

144. See Colombos 181.

145. Bruel, International Straits 245 (1947).

foreign pilots, the protection of buoys, beacons, lightships, submerged cables and pipelines, and the prohibition of maneuvers or gunnery practice within a fixed distance from shore.[146] These are but a few.

It is generally recognized that a littoral state may set rules requiring ships passing through its territorial seas to render certain salutes and to show the flag of the ship's nationality. Failure to do so has resulted in serious consequences. In 1864, the British schooner The Mermaid failed to exhibit her flag while she was in Spanish territorial waters. She was sunk by Spanish cannon-shot.[147] In February, 1958, the Indonesian navy arrested and held the British ship Moon Breezes for failure to fly the British colors while in Indonesian waters.[148] Indonesia has also furnished at least two other examples of regulations and their effects. In

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146. See Colombos 120-1; Franklin, The Law of the Sea: Some Recent Developments, 53 Naval War College Blue Book Series 89 at 131-47 (1961).

147. See Colombos 150.

148. See Brittin & Watson, op. cit. supra note 136, at 68.

August, 1960, it forbad Dutch vessels from picking up or discharging passengers or cargo in Indonesian waters.[149] Thus, although the Dutch ships could sail through the newly created "internal waters" of Indonesia, they could conduct no commercial operations. Three years later Indonesia's quarrel was with Malaysia. On December 26, 1963, the Indian ship Mohamedi with 276 persons aboard, stuck on a reef near an island between Singapore and Indonesia. The Barbain, a British Navy salvage ship out of Singapore went to its aid but was ordered out of the area by three Indonesian gunboats.[150]

These last two Indonesian actions raise the question: What determines the validity under international law of a regulation of a coastal state? Basically, this question is answered by balancing one paragraph of the Convention on the Territorial Sea and the Contiguous Zone against two others. On the one hand, "The coastal State must not hamper innocent passage through the territorial sea."[151] On the other hand, "The coastal State may take the necessary steps

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149. N.Y. Times, June 20, 1960, p. 56, col. 7.

150. Washington Evening Star, Dec. 27, 1963, p. A-11.

151. Art. 15, para. 1.

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in its territorial sea to prevent passage which is not innocent"[152] and

> Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law, and, in particular, with such laws and regulations relating to transport and navigation.[153]

One intention of the Conference is clear enough from these quoted paragraphs. Coastal states do have the right to make regulations provided those regulations are necessary to prevent passage which is not innocent and provided they do not hamper innocent passage.[154]

The line between these two provisos can only be drawn by using the test of reasonableness. Assume, for example, that a coastal state issues a regulation prohibiting the carrying of nuclear weapons aboard ships in

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152. Art. 16(1).

153. Art. 17.

154. Although the matter is not expressly stated in the record of the conference, McDougal, with "first-hand" information concludes that another intention of the delegates was to allow a coastal state to preclude innocent passage for a violation of a regulation pertaining to the "peace, good order or security" of the coastal state on the ground that such a violation made the passage not innocent. Ships could not be excluded for violation of other regulations. McDougal 254.

[illegible]

[illegible]

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its territorial seas. Obviously, such a regulation would be of gigantic military significance. Is it a lawful regulation?[155]

In 1923, in pursuance of a Prohibition policy, the United States Treasury issued a notice which prohibited the introduction of all liquor into the territorial waters of the United States. In writing about this situation, one authority has stated that "it is believed that the proposition is unquestionable that under international law every nation may prohibit the introduction into its territory of any commodity which it sees fit to exclude."[156] While agreeing with the statement as a basic tenet, a number of nations contested the United States prohibition on the ground that by international comity, they had a right to ship their products through the territorial waters of other nations without being stopped. Even these nations, however, recognized that comity did not extend this right to the shipment of items that would disturb public order.[157] The first question, then, to be answered is whether, under

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155. For a detailed analysis of this question, see Franklin, op. cit. supra note 146, at 139-44.

156. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 219 (1927). See 1 Oppenheim 323 to the same effect with regard to trade restrictions.

157. Jessup, supra note 156, at 221-28.

the conditions existing at the time, the introduction aboard ship of nuclear weapons into the territorial waters would disturb public order or endanger national security.

In the Committee debate on the Convention on the Territorial Sea and the Contiguous Zone, Yugoslavia introduced a proposal which would have allowed the coastal state to deny innocent passage "to any ship carrying any kind of nuclear weapon"[158] This proposal was rejected with only seven votes in favor of it.[159]

The conclusion may be drawn from this rejection that there is no blanket prohibition in international opinion against the carrying of nuclear weapons in territorial seas. This does not answer the question, however. Just because a regulation against <u>every carrying</u> of nuclear weapons would, in international opinion, constitute an undue hampering of innocent passage does not mean that <u>every regulation</u> against carrying nuclear weapons would obtain the same result. The test of reasonableness must be applied. If the regulation pertained to only one situation or one area where a particular, recognizable, serious danger to the security of the state existed from

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158. U.N. Doc. No. A/CONF.13/C.1/L.21 (1958).

159. 3 Off. Rec. 131, U.N. Doc. No. A/CONF.13/39 (1958).

the passage of nuclear weapons, it might indeed be reasonable for the state to prohibit it. Using the test of reasonableness, then, a state may issue regulations which ships in innocent passage must obey.

In discussing the enforcement of regulations, a distinction must be made between warships and merchant ships.[160] There has long been a standing rule of international law under which warships are immune from the jurisdiction of a foreign coastal state whenever their presence in the port of that state has been either expressly or impliedly allowed. In The Schooner Exchange v. McFadden,[161] an 1812 United States Supreme Court case, Chief Justice Marshall blazed a trail that has been referred to by courts ever since.[162] In 1810, during the

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160. In the past the distinction has been between government-owned ships and privately owned ships. With the communist claim that all of their ships are government-owned and the distaste on the part of other countries for granting immunity to all communist ships regardless of their purpose, a new distinction had to be drawn. Art. 21 of the Convention on the Territorial Sea and the Contiguous Zone expresses this new distinction by providing that government ships operated for commercial purposes will be treated the same as merchant ships.

161. 7 Cranch. 116.

162. Although Chief Justice Marshall apparently overlooked a contrary decision by the U.S. Attorney General, 1 Ops. Att'y Gen. 87 (1799), and there have been attempts to discredit this case, it is still a recognized landmark in the area of immunity of warships.

Napoleonic wars, French authorities had seized The Schooner Exchange which, until seizure, had been the property of United States citizens. The schooner was converted into a French warship, Le Balaou, and, as such, entered the port of Philadelphia. Her former owners sought to gain possession of her. Holding for France, Chief Justice Marshall stated: "It seems to the Court to be a principle of public law that national ships of war, entering the port of a friendly Power open for their reception, are to be considered exempted by the consent of that Power from its jurisdiction."

In 1879, in much the same language, the English Court of Admiralty concurred with the Exchange opinion. The case was that of The Constitution,[163] a United States frigate which became stranded off the English coast and was towed to an English port. The amount tendered to the tug owners for salvage was not adequate in their view and they sought to restrain the frigate from leaving port until their demands were satisfied. The Court of Admiralty denied that the tug owners had such a right against a warship of a foreign sovereign.

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163. The Constitution, [1879] 48 Law Rep., Prob., Divorce & Adm. Div. 15.

[illegible] story, Roman mythology had solved the [illegible] problem [illegible] world reborn, and here the [illegible] or coupled storms alliance. The audience was [illegible] into a Trojan morality, [illegible] and even, [illegible] its part in [illegible]. Her fierce empire [illegible] in [illegible] association or [illegible]. Uniting the Trojans, [illegible] Trojan community struck, [illegible] was known to the Greek [illegible] is in a relation of unity [illegible] that continued rules of war, entering the mark of a fatality [illegible] room for chaos [illegible], when to be considered [illegible] by the accepted of that [illegible] from its [illegible].[1]

In 1170, to mean the [illegible] January, the Orsini [illegible] of [illegible] assumed with the [illegible] [illegible]. The [illegible] not that of [illegible],[167] a [illegible] [illegible] Trojans [illegible] [illegible] are the [illegible] among and [illegible] in [illegible] [illegible]. The [illegible] [illegible] [illegible]

While both of these cases dealt with ships in port, the result is essentially the same for the territorial sea. Warships enter the territorial waters of a coastal state under a consent implied in international custom. They must be treated as though they are "floating portions of the flag state."[164] Thus, if an offense occurs and a warship is the offender, only two courses are open to the aggrieved state under international law. First, it may, if the violation continues after the ship has been notified of it, require the ship to leave the territorial sea.[165] Second, the offended State may protest to the government of the State to which the offending ship belongs.

The plight of merchant ships is another matter, however, and, because they transport military supplies as well as support the civilian community from which military supplies and support are derived, their plight

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164. 1 Oppenheim 461, 852-55.

165. Convention on the Territorial Sea and the Contiguous Zone, art 23, supra note 112; 1 Oppenheim 855.

is of decided military importance.[166] Articles 18, 19 and 20 of the Convention on the Territorial Sea and the Contiguous Zone express a summary of the international law in this area.[167] By express language and by permissive rather than mandatory phrases, these articles allow many instances in which the free movement of merchant ships can be impeded in territorial waters. Of particular importance to a discussion of enforcement

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166. Mr. Dean, in his usual perceptiveness, has commented that "The operation of commercial shipping on, or commercial aircraft over, water would also be greatly handicapped, slowed down and subjected to interminable delays. Indeed, it would seem to have been part of the Russian purpose in backing extensions of the territorial sea so to hamper the commerce of the free world as a part of its sand-in-the-gear-box technique . . . . The right and ability of merchant ships carrying goods and passengers to schedule the most economical passage possible between ports, to enter and leave harbors freely, and to move on the surface of the water without interruption or delay would be jeopardized." Dean, The Geneva Conference on the Law of the Sea: What Was Accomplished, 52 Am. J. Int'l L. 607, at 612 (1958).

167. For a good analysis of this area of law see Lee, Jurisdiction Over Foreign Merchant Ships in the Territorial Sea: An Analysis of the Geneva Convention on the Law of the Sea, 55 Am. J. Int'l L. 77 (1961).

[illegible]

of regulations are the provisions of article 20. In part it provides that where there are "obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State," that state may "arrest the ship for the purpose of . . . civil proceedings." Further, the state has the right, "in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters." In other words, if a foreign merchant ship violates a regulation of the coastal state while in the territorial or inland waters of that state, it may be arrested for civil proceedings.[168] This threat, as well as the threat of any hinderance or nuisance from the regulations of coastal states could well cause the merchant lines to change to longer routes. Whether they do this or lose money due to delays, shipping costs are increased.

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168. But see Sorensen, Law of the Sea, Int'l Conc. No. 520, 195, at 234 (1958) where the conclusion is that, although the coastal state is authorized to enforce its regulations, it is not allowed to prevent passage merely on the ground of their violation.

[illegible]

These costs ultimately are borne by the countries dependent upon ocean commerce for their existence. Since, in general, these are the free countries of the world, the members of the oceanic confederation, the Communists countries have much to gain by broadening territorial seas.

g. Passage In Wartime

The foregoing discussion of innocent passage has dealt primarily with a peacetime situation. A much different picture is presented under a wartime situation. There is, of course, no right of innocent passage between antagonists nor are they concerned with the legality of their acts in each other's territorial seas as long as they do not violate the laws of war. The concept of innocent passage applies only in neutral waters and is severely limited by the requirement that neutral waters not be used to advance the war effort of the belligerents. A peacetime extension of territorial seas with the right of innocent passage would, to a large extent, become a wartime extension without such rights. A strait which now is high seas would, if it became the territorial sea of a neutral nation in wartime due to an extension of the breadth of the territorial seas, be closed to any

activity which would promote the wartime goals of a belligerent. It is obvious that the extent and seriousness of this result is entirely dependent upon which countries are neutrals and which are not. The United States must assume the worst, however, for it cannot base policy on the unlikely chance that all of the important routes will be under its control or that of its allies. Assuming the worst in this respect, and remembering that over half of the 100 most important straits would become territorial seas under a breadth of six miles and all would be in that category under a twelve-mile limit, a major disadvantage to the free world in the extension of the breadth of territorial seas is evident.[169]

C. Violations of Neutral Territory

Ordinarily, innocent passage refers to passage that is innocent as to the security and peace of the coastal state. When a neutral is involved in wartime, that

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169. In a statement made before the Senate Foreign Relations Committee on Jan. 20, 1960, Dean stated that "under the 12-mile territorial sea rule, 18 straits would come under the sovereignty of states which possibly would claim the right to terminate or interfere with the transit of our warships or aircraft, and . . . the denial of passage through these . . . straits would present for [the United States] . . . a completely unacceptable impairment of [its] . . . defensive mobility and capacity." 42 Dep't State Bull. 251, at 260.

passage must be innocent as to a belligerent state as well. When it is not, there has been a violation of neutral territory.

For instance, during peacetime the passage of a ship through the territorial sea of one state does not concern any other state. The ship owes a duty to obey the regulations of the coastal state but not those of any other state. Likewise the coastal state owes a duty to the ship not to unduely hinder its passage or fail to warn it of dangers but does not owe any duty to a third state. In wartime, however, belligerents are interested in the circumstance of an enemy ship because it has a direct effect on its military strategy. Therefore, a neutral country owes a duty to third states who are belligerents not to allow their enemies to unlawfully use its waters. In a sense the passing ship also owes a duty to the third state since its passage must be in accordance with international law which gives a belligerent state a basis to require that its enemy not violate neutral territory.

At the Geneva Conferences, one of the dominant themes expressed by the United States against the extension of the territorial seas was that extension would encourage an increase in violation of neutral territory.

The broader the neutral territorial sea is, the more attractive it becomes to a belligerent ship. One reason, of course, is that navigation is easier if it is within sight of charted navigational objects, lighthouses, et cetera, and ship's Captains are generally disposed to navigate where it is easiest. The broader the territorial sea, whether neutral or not, the greater the temptation to go within it in order to use on-shore navigation aids. For a case in point, consider the seizure of the Flying Clipper, a Swedish ship by the Russians in the Baltic Sea on August 29, 1956.[170] Because of a storm the Flying Clipper had drifted off course and had entered the twelve-mile zone claimed by Russia in order to use landmarks to check its position.

Of greater concern, however, is the intentionally belligerent use of neutral waters. Submarines, for instance, would be particularly lured into the excellent haven furnished by a broad territorial sea. Navigation hazards within a three-mile limit, as well as the good chance of detection within that range makes the use of neutral waters an undesirable evasive manuever. Between

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170. N.Y. Times, Aug. 30, 1956, p. 4, col. 6.

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[17]. F.C. Clowes, supra fn. [16], at [illegible].

three and twelve miles, however, the hazards to submerged navigation are decreased, in most areas and, because present day detection of underwater objects at a distance beyond three miles is not adequate, this area furnishes a tempting, although illegal, haven.[171] The submarine would be out of range of ordinary detection from the shore and, unless a pursuing surface fleet openly violates the neutrality of the coastal country by making an attack within its territorial sea, from a surface anti-submarine force. Thus, an enemy submarine might avoid detection and capture when it is pursued, but it can do even more than that. Nestled securely in the safety of neutral waters, the submarine might, without interference, launch an attack against the coastal state or against an enemy target within range of the neutral state's territorial seas. Because of their numerical superiority in

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171. Although art. 14 of the Convention on the Territorial Sea requires submarines to navigate on the surface and to show their flag, it would be optimistic and naive to expect an enemy to abide by this provision during wartime.

[illegible]

submarines,[172] this situation would be of particular advantage to the Soviet Union. This may well be another reason for the Russian insistance on broad territorial seas and is certainly a cogent reason why the Free world would want to keep as much open seas as possible.

In view of imminent attack from a submarine lurking in neutral waters, the Captain of a warship could hardly be blamed if he elected to take direct defensive action rather than to submit a protest through diplomatic channels.[173] Assuming he violates neutral territorial waters and attacks the malevolent submarine, may he

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172. Since the end of World War II, a considerable shipbuilding program has been maintained by the Russian Navy, and it is estimated that Russia now has over 500 submarines, Jane's Fighting Ships 288 (1959-60). The submarine has the dominant role in Russian naval strategy. Garthoff, supra note 89.

173. For an interesting case where a Captain elected to attack an enemy ship in neutral waters, see the exchange notes of the Dresden incident as reported in 7 Hackworth, Digest 370-71.

capture her or take her crew captive? Since a submerged submarine is not in innocent passage, the answer is probably yes. But as to a surface ship, unless its belligerent purpose can be proven, the answer is no. As an exception to the general rule that enemy property can be captured wherever it happens to be, enemy property located in the territorial waters of a neutral state is not the subject of capture. Even though capture is unintentionally accomplished in neutral waters, the property must be returned to the enemy.[174] In The Vrow Anna Catharina,[175] an English case in 1803, the issue was whether or not a ship had been seized on the high seas or "within the protection of land." Sir William Scott set forth the graveman as follows:

> The sanctity of a claim of territory is undoubtedly very high . . . . When the fact is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy.

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174. See Colombos 544.

175. 5 C. Rob. 15 (1803), 165 Eng. Rep. 681 (dictum).

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175. See opinions pp.

176. 3 U. Pa. L. Rev. 13 (1855), 163 Eng. Rep. 693 (Gloucs).

Article 1 of Hague Convention XIII[176] espoused the same principle by requiring belligerents to "respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality."

The case of the Altmark, which arose in February, 1940, during the Second World War, illustrates, however, that this immunity of an enemy from attack in neutral waters pertains only where the enemy property is present in "innocent passage." This incident also points out another example of the misuse of territorial waters that would be increased with a broader limit to the military detriment of a nation trying to respect neutral rights. The Altmark,[177] a German naval auxiliary, was used to transport British merchant seamen prisoners who had been captured by the German cruiser Admiral Graf Spee. Having

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176. Convention XIII of October 18, 1907, concerning the Rights and Duties of Neutral Powers in Naval War, Second Hague Peace Conference, Feb. 1, 1910, 36 Stat. 2415, T.S. No. 545.

177. See 7 Hackworth, Digest, 568-69 (1943) for another statement of the facts.

170. Convention XXII of October 12, 1907, Recueil des Lois et Coutumes de la Guerre, Hague Conventions, 1907, p. 1220, Carnegie Endowment for International Peace, Division of International Law, Washington, D.C., 1915.

171. See 2 Oppenheim, "International Law," 7th ed. (1952) for detailed discussion of the issues.

been taken in the South Atlantic, it was necessary to transport them back to Germany through the Allied naval blockade which existed at that time. In order to avoid capture or attack in the English Channel, the Altmark went north through Icelandic waters and then started south using the neutral Norwegian territorial waters as a protected corridor. British forces, however, learned of the presence of the Altmark and, when Norwegian authorities refused to allow a British inspection of the ship, the British forces boarded the Altmark and released the prisoners.

While the Altmark incident illustrates an illegal belligerent use of neutral waters, it also shows that neutrality is a two-way street. Both the neutral country and the ships using its waters have their respective duties under international law. Hague Convention XIII codifies these "do's and dont's" of neutral waters. With the Convention as a background, arguments have raged between nations and authorities as to whether Norway was delinquent in its duties as a neutral by allowing the Altmark to use its waters and whether or not the British forces had the right to make a search

as they did.[178]

The duty of Norway is important in this discussion because it indicates the adverse military effect which a neutral state's decision may have. If the neutral state decides that the action of an enemy belligerent ship is legal and will take no action against it, it places the burden upon the opposing belligerent of either accepting that decision or running the danger of violating neutrality. Looking at the question from the other side, if the neutral state decides that a transit of one of our ships is not innocent, it may detain or otherwise interfer with the passage of that ship.[179] Thus, looking at the question from either side, a broadening of the territorial seas will produce a broadening of the area in which a neutral state may adversely affect our wartime efforts.

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178. For a general discussion of Norwegian and British rights and duties see MacChesney, The Altmark Incident and Modern Warfare -- "Innocent Passage" in Wartime and the Right of Belligerents to Use Force to Redress Neutrality Violations, 52 Nw. U. L. Rev. 320 at 337-40 (1957). For opinions holding Norway to have been under a duty to prevent passage see 2 Oppenheim, International Law 692-95 (7th ed Lauterpacht 1952). Contra, 1939 Naval War College, International Law Situations 14-15 (1941).

179. Hague Convention XIII, art. 24, note 176 supra.

Whether or not the British forces were acting lawfully in the Altmark situation depends upon an interpretation of the circumstances. There is general, although not unanimous, support[180] among authorities for the position that

> a belligerent is not forbidden to resort to acts of hostility in neutral jurisdiction against enemy troops, vessels, or aircraft making illegal use of neutral territory, waters or air space, if a neutral State will not or cannot effectively enforce its rights against such offending belligerent forces.[181]

The breach of neutrality must, however, be sufficiently serious to justify such an extreme measure. It must be required for self-preservation.[182] According to the International Court of Justice, the use of force in territorial water to obtain evidence upon which to prosecute a breach of a coastal state's duty to shipping

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180. MacChesney, supra note 178, at 339. But see Bisschop, The Altmark, 9 Transact. Grot. Soc'y 67 (1941) where it is held that neither illegal confinement nor retaliation was justification for the British action.

181. U.S. Dep't of the Navy, Law of Naval Warfare, sec. 441 (1955).

182. MacChesney, supra note 178 at 337-40.

in those waters is not a serious enough cause to justify help.[183] How much more serious it must be is an unanswered question in international law. The result, in any case, is that a broad territorial sea gives an enemy more room in which to operate clandestinely and gives the United States less operating room in which to ferret out such activity.

D. Mobility and Dispersal

The hinderance on operating room which is a concomitant of a broad territorial sea is a complaint of much more general application than not being able to investigate violations of a coastal state's sovereignty. It is a military burden whether in peace or war or cold war.

In these days, with the possibility of nuclear attack, fleets must be dispersed over a wide area. While it is true that a twelve-mile territorial sea would still leave quite a large ocean area for dispersal of fleets, this is not the answer to the problem. Part of the problem is how to get to these areas. The old World War II tight formation of ships to guard from

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183. See Corfu Channel case, p. 70, supra. Although this was not a neutrality case it is analogous to the extent that the same circumstance in neutral waters would not justify self-help either.

[15]. See Wade Cleveland Hawks, 70 F. Supp. 1, finding that while not a monopolist there is no violation of the antitrust laws for purposes of injunction to maintain competitive conditions.

submarine attack has had to give way to a dispersed formation more suitable to defense against nuclear attack. For a present-day task group to travel about the oceans, they should be dispersed over an area roughly the size of New York State.[184] It is obviously difficult to move a group of this size through congested areas such as straits and island-spotted seas without lessening its defenses. Any extension of territorial seas makes it that much more difficult. Because of the uncertainty of the right of innocent passage for warships in peacetime and the limit of three warships that can be in neutral territorial seas at any one time during wartime,[185] it is conceivable that the number of passages open to Naval forces could be extremely limited with a broad territorial sea. This could force a large amount of military traffic through one area, increasing the risk of attack in that area.

An even more important part of the problem is whether the forces can be dispersed in an area where

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184. See statement of Adm. Burke quoted in Eller, Implications of Soviet Sea Power, published in The Soviet Navy 299, at 313 (Saunders ed. 1958).

185. Hague Convention XIII, art. 15, supra note 176.

they can be effective. For an example, assume that fighting broke out in Singapore. If the Navy were to respect the claimed Indonesian internal and territorial waters, it would be impossible to disperse a task group in the immediate area. This is not an isolated instance. In the Aegean, the eastern Mediterranean, the other seas around Indonesia, and the seas adjacent to the Philippines and Japan an extension of each island's territorial sea would restrict the operational ability of the fleet.[186] Such an extension would have made the landing of American troops in Lebanon of questionable legality. In the area between Formosa and China, the recognition of a twelve-mile territorial sea would mean that the United States ships protecting Quemoy and Matsu would violate territorial waters.[187]

E. Diplomatic Deployment

During the past few years the Navy has been particularly effective because of its capability of being deployed quickly for limited war and cold war purposes

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186. See Dean, Freedom of the Seas, 37 Foreign Affairs 83, at 90 (1958).

187. Dean, The Geneva Conference on the Law of the Sea: What Was Accomplished, 52 Am. J. Int'l L. 607, at 612 (1958).

to prospective trouble spots, without violating national sovereignties. The effectiveness of this capability of bringing pressure to bear without firing a shot and of staying as long as necessary is attested to by the inverse tribute paid to it by Soviet Premier Krushchev. In a letter received September 8, 1958, by President Eisenhower, Mr. Krushchev stated:

> In connection with the practice of transporting war fleets and air units from one end of the globe to another, for example, the regions of the Near and Middle East, the Far East, Latin America etc. in order to bring pressure to bear here on some, there on other states and to attempt to dictate one's will on them, in general the question arises -- isn't it time to finish with such actions which, it goes without saying, can in no way ever be recognized as normal methods in international relations. There arises the legitimate question -- ought this not be discussed in the UN and a decision be adopted forbidding powers from employing such movement of its naval and air forces for purposes of blackmail and intimidation and to the effect that these forces would be held within the limits of their national frontiers.[188]

In order to be able to be of continued effectiveness on these "diplomatic deployments" it is essential that the same proximity of Free world might be communist-inspired trouble spot be maintained. In other words,

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188. Reprinted in 39 Dep't State Bull. 499, at 500 (1958).

since its main reason for effectiveness is the psychological effect of its presence, it must be capable of being seen. A fleet only three miles away can be easily seen. If it must be dispersed six miles out its effectiveness is diminished. If twelve miles, it is out of sight and mind. Its presence is a mere rumor which dare not materialize without treading on sovereign seas.

F. Calm Water Operations

A final result to be discussed is the deprivation of the use of much calm water lying in land-protected areas within twelve miles of the shore. Not only is the use of such water of benefit during rough weather but it is also idealy suited for a number of military exercises. Refueling at sea, transfer of supplies and personnel, the launching and recovery of airoraft, gunnery exercises, and many others can be accomplished with less risk of loss and damage if they can be performed in the calm of sheltered waters.

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Chapter IV

CONCLUSION

In the foregoing pages an attempt has been made to set forth some of the militarily important legal effects that would result from extensions of territorial seas under present conditions and laws. The compilation is not exhaustive. The more important areas have been selected and discussed in an effort to typify the legal results that can be expected.

To say that the survival of the Free world depends upon the maintenance of the three-mile limit is, of course, an exaggeration. But to say that the loss of a narrow territorial sea limit in favor of a broad limit is a major step in the direction of the defeat of the Free world is fearfully realistic. The Free world is dependent upon its sea lanes and the air lanes above them for its communications. A nation that can block or disrupt the sea lanes has won a major, if not the deciding battle against the oceanic community of nations in which we live.

How can the extension of territorial seas serve this purpose? By closing large areas of the high seas to overflight and submerged passage. By carving out of the high seas large areas of territorial waters with the

hinderances, restrictions, and increased shipping costs that can result thereby. By making international straits out of the high seas and imposing the same hinderances. By opening up broad havens for enemy submarines. By increasing the temptation to violate territorial seas in order to obtain more reliable navigational information. By providing wider corridors for less conspicuous belligerent passage in neutral waters. By depriving the maritime nations of the world of areas of calm waters. And by placing limitations upon the mobility of the fleet in general, whether subsurface, surface, or aerial.

Having previously drawn the conclusion that an extension of the territorial limit is inevitable if the present trend is not altered, the question remaining is: What to do about it? One alternative is to seek to impose and retain, by international agreements, the protection afforded by a narrower limit. This could well include the expansion of the doctrine of innocent passage to insure its application to surface warships and to broaden its application to include subsurface transit and flights over straits and similar waterways. The preserving of high sea transit rights in the expanded areas would prove beneficial. The imposition of

limitations on the use of the straight line method of determining baselines would be helpful although attempts to this end at the Geneva Conferences were largely to no avail.

As an alternative approach, it is suggested that the concept of a territorial sea has outlived its need. To say that it should be abandoned altogether and that all external waters should revert to the high seas would seem to be an extreme suggestion. Certainly a great amount of educating would be required for such a proposal to be successful. It is advanced, however, with the belief that it affords a solution for the future. Is there any long a reasonably valid need for the exercise of total sovereignty in a comparatively narrow strip of water along the coasts of a nation? Can a need be named which could not as easily be taken care of by the allowance for a special, limited exercise of sovereignty in the adjacent maritime area?[189] Coastal states

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189. Although not made with a total discarding of territorial seas in mind an apropos statement has been made that "whatever the particular interests motivating claims to extension by individual states, the necessary measures for securing such interests hardly require community recognition in the claimant state of all the exclusive authority customarily associated with the territorial sea." McDougal 74.

already have the right to reasonably protect themselves, the right to natural resources of the continental shelf, and the right to enforce customs, fiscal, immigration and sanitation laws and regulations beyond its territorial sea. Should, by international concensus, other special extensions of sovereignty be required, such as an exclusive fishing zone, they can be added to the list. But by doing away with the concept of the territorial sea we would do away with the restricting concepts, terminology, and practices that surround it and could start afresh in accordance with modern needs. Most states have no extra area of protection along their land boundaries. Why should the nations of the world be deprived of high seas to furnish such an area along ocean boundaries?

Are the attempts to expand the territorial seas of the world a vital problem in our day? They most certainly are. The Russian bear is avarice. He works in many areas and in many ways to satisfy his cupidity. One of these is the extension of territorial seas. Mr. Krushchev has promised the United States a burial. It may not be on land. It can just as well take place at sea.

ASSAGE AREAS AFFECTED BY
ERRITORIAL SEA
BERING 19
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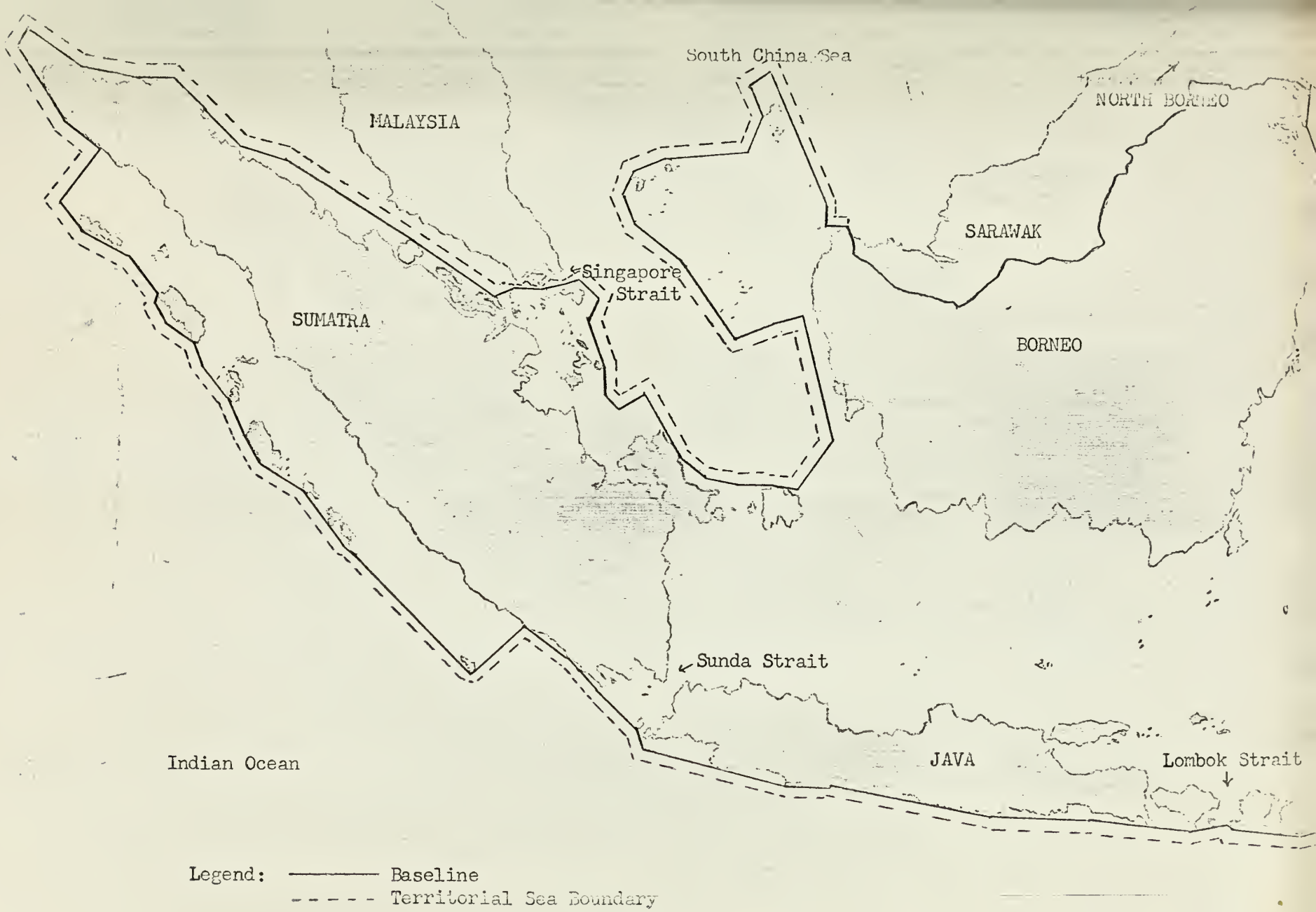
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NORTH BORNEO
SARAWAK
Singapore Strait
SUMATRA
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Sunda Strait
Indian Ocean
JAVA
Lombok Strait
Legend: ——— Baseline
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